

U. S. DISTRICT COURT

MAY 29 1924

W. A. STANLEY

No. 1012 377

In the UNITED COURT of the UNITED STATES

OCTOBER TERM 1923

**CHARLES SHERWIN and HARRY H. SCHWALB,
Petitioners,**

vs.

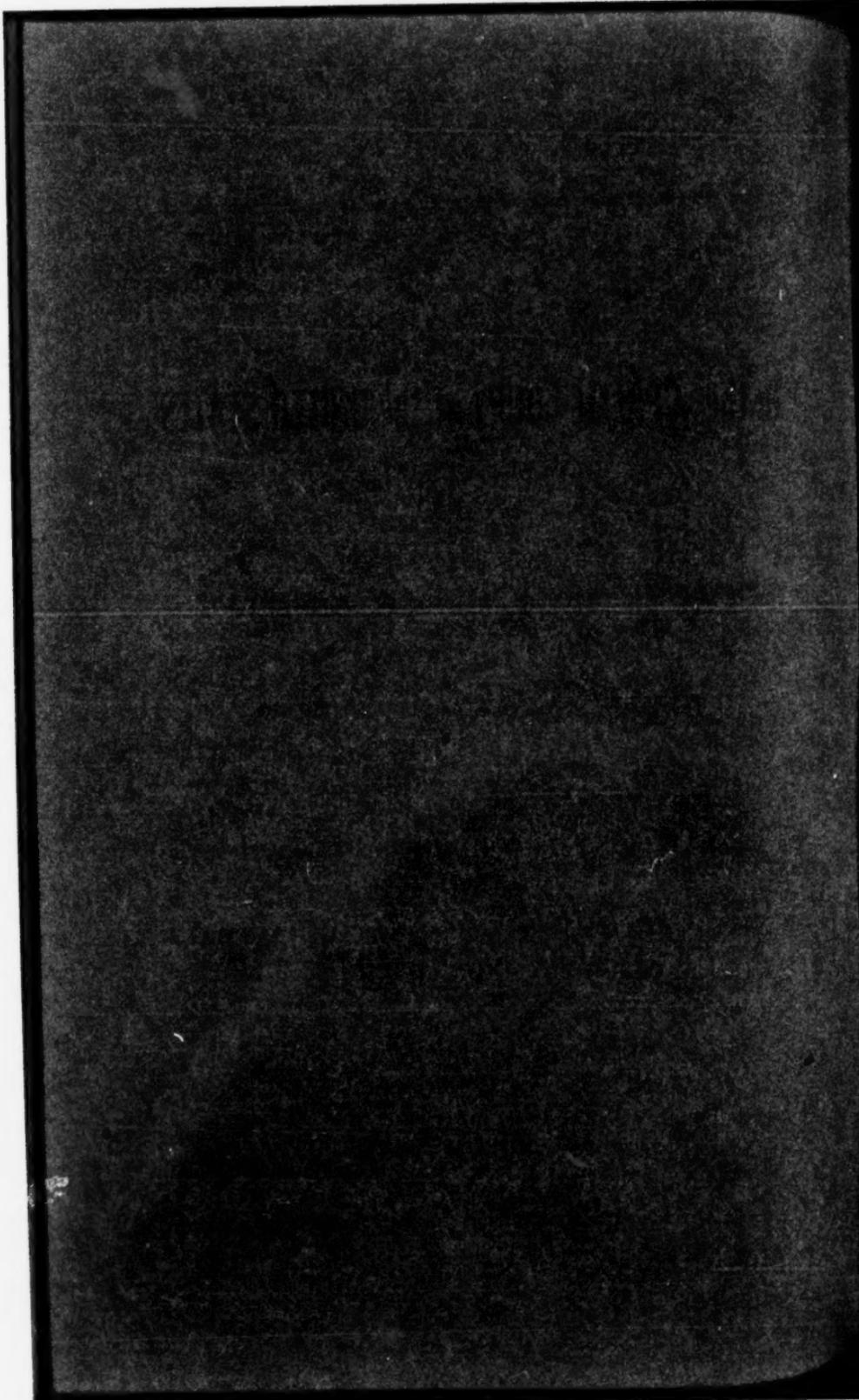
**THE UNITED STATES OF AMERICA,
Respondent.**

PETITION FOR Writ of CERTIORARI

TO THE

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

**W. P. McLEAN, JR.,
WALTER B. SCOTT,
Attorneys for Petitioners,
New York, N. Y.**



In the SUPREME COURT of the UNITED STATES

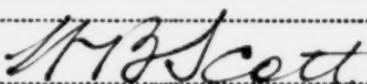
OCTOBER TERM 1923

CHARLES SHERWIN and HARRY H. SCHWARZ,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Now comes Charles Sherwin and Harry H. Schwarz, by and through their counsel W. P. McLean, Jr., and Walter B. Scott, and move this Honorable Court that it shall, by certiorari or other proper process directed to The Honorable, The Judges of the United States Circuit Court of Appeals of the Fifth Circuit, require said court to certify to this court for its review and determination, a certain case in said Circuit Court of Appeals, lately pending, wherein the respondent The United States of America was defendant in error and your petitioners Charles Sherwin and Harry H. Schwarz were plaintiffs in error, and said petitioners herewith tender their petition and brief, together with filed and certified copy of the record in said cause in said Circuit Court of Appeals.



Fot Worth, Texas.
Counsel for Petitioners.



No.

In the SUPREME COURT of the UNITED STATES

OCTOBER TERM 1923

CHARLES SHERWIN and HARRY H. SCHWARZ,
Petitioners,
vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

*To the Honorable Chief Justice, and Associate Justices
of the Supreme Court of the United States:*

Come now Charles Sherwin and Harry H. Schwarz, citizens of the United States, and petition Your Honor for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit, in cause No. 4201, styled Charles Sherwin and Harry H. Schwarz, plaintiffs in error, vs. The United States of America, defendant in error, and for same would show:

That an indictment was filed on the day of 1923, in the United States District Court for the Northern District of Texas, and in the Fort Worth Division, against the petitioners and others, which indictment contains six counts; the first five of said counts charge an offense under Section 215 of the Criminal Code, that of devising and attempting to devise a scheme and artifice and the using of the United States mail in the further-

ance of said scheme. The scheme in each of the counts of the indictment was the same, and are as follows:

"That said defendants would organize and promote divers oil companies and sell the shares thereof, to-wit: General Lee Interests No. 1, divided into 1,250 shares of the par value of \$20.00 each, General Lee Interests No. 2, divided into 900 shares of the par value of 20.00 each, General Lee Development Interests, divided into 250,000 shares of the par value of \$1.00 each, and divers other similar concerns to the grand jurors unknown, all under the guise and in the form of trust estate and with principal offices at Fort Worth, Texas, for the pretended purpose of engaging in the production and sale of oil and gas leases and engaging in the oil business in general, for profit, and that they would issue large amounts of shares or certificates of beneficial interest in said companies and that they would sell the same to any and all of said persons to be defrauded whom they could induce to purchase said shares or certificates by making false and fraudulent representations, pretenses and promises concerning said companies, and also as to the standing, character and qualifications of the defendant Robert A. Lee, and concerning very large dividends and profits at an early date to their shareholders of certificate of interest holders and that such false and fraudulent representations, pretenses and promises would be made by said defendants and their sales agents, both orally and by written and printed matter advertisements and publications, in order to induce said persons to be defrauded to purchase beneficial interest in said companies, such representations to be made through and by means of newspapers, magazines, and other publications, and in form of posters, circulars, pamphlets and circular letters and personal correspondence, all of which said matter was and would be sent to said persons to be defrauded, for the purpose of inciting and inducing said

persons to purchase said shares or beneficial interests in said companies, and to pay over their money and property to the said defendants, in order that they, the said defendants, might fraudulently appropriate and convert large portions thereof, to their own use and benefit.

And the said defendants planned and schemed, that for the purpose of so inciting and inducing said persons to be defrauded to deliver over to them, the said defendants, their money and property, they, the said defendants, would make false and fraudulent pretenses, representations and promises, in substance and in effect, as follows, to-wit:"

and then followed a great number of the alleged false and fraudulent representations, covering about eight pages of the record.

Then, in each of the counts is set out a letter, which is charged to be the overt act of using the mails in furtherance of the alleged scheme. The sixth count of the indictment charged a conspiracy to do and cause to be done the divers offenses charged against the petitioners in the divers counts from one to five, and certain overt acts alleged in the indictment comprising principally the mailing of letters which are set out in the indictment.

To this indictment petitioners filed and presented a plea in bar or plea of immunity, in which they alleged in substance that they were connected as officers with certain companies, known as General Lee Interests No. 1; General Lee Interests No. 2, and General Lee Development Interests, and were so connected prior to the time they were indicted by the grand jury, and that while they were so connected one John F. Southworth, who was either a member of the Federal Trade Commission or one of its duly authorized agents, came to the offices

of the company, and to these petitioners, and demanded to know of them why they had not answered a letter he had addressed to them, or that the Federal Trade Commission had addressed to them, seeking certain information with reference to the General Lee Interests, and that while at the offices the said John F. Southworth, as the Federal Trade Commission, or as one of its officers, demanded of petitioners that they furnish him the information he sought with reference to these General Lee Interests, and under threat and coercion, compelled these petitioners to give him the information he sought. That at first petitioners refused to give the information, but their attorney having been summoned and the said John F. Southworth having read the Federal Trade Commission law to the attorney of the petitioners, and to the petitioners, convinced said attorney that petitioners were subject to the Federal Trade Commission law, and that they were compelled to furnish to him (Southworth) the information he had demanded, and the attorney for petitioners advised petitioners that they were committing a crime if they refused to deliver the information and furnish any evidence Mr. Southworth sought.

That before this conference, petitioners had received a letter, to which they did not reply, but which letter dated June 30, 1923, addressed to the General Lee Development Interests, and read in part, "The Commission officially requests, under sections 5, 6, 9 and 10 of the Federal Trade Commission Act, that you report to it and furnish at once information called for by the annexed schedule. * * * Your attention is respectfully called to the penalties provided in section 10 of the Federal Trade Commission Act for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry;" and this was the letter that petitioners had received, and which they had failed and refused to answer that Mr. Southworth inquire!

about when he came to the office, and after Mr. Southworth had convinced the attorney of petitioners and petitioners that they were compelled to answer his questions and furnish him information and furnish him documents, that he sought, petitioners then furnished him everything that he desired. They said that he came to the offices about six times before they were convinced that they were compelled to furnish him information, and after that he came there about twenty times; they carried him out over the properties of the companies; that they furnished him everything he asked for; that he made copies of their declarations of trust, contracts, leases, and that he demanded of them their correspondence with reference to their dissatisfied stockholders, and that they furnished all of these things to him; that he left their office finally with many of these copies in his portfolio which he carried away with him. They say they furnished him everything that he requested, declaration of trust, copies of contracts, copies of leases, showed him records of the books, gave him a list of the stockholders, some of the correspondence which they had with stockholders, and Mr. Southworth read that and made notes as he went along; that he had copies made of any document that he wanted; that there was a contract between Mr. Lee and Mr. Schwarz and Mr. Sherwin and that Mr. Southworth demanded that and it was furnished him; in fact they surrendered to him everything that he demanded; that the records they gave him were from their files and offices; that when he left their offices and the city, after he had visited their offices about twenty times, he carried with him this information and copies of instruments.

Petitioners say that before they gave up any information to him, Mr. Southworth read the law to them and their attorney, and he claimed that petitioners were violating the law in refusing to furnish him the informa-

tion, and that he had authority as an official of the Federal Trade Commission to demand the information and receive the same, and that being convinced that they were compelled to give him this information, and that they would be guilty of a penal offense if they did not furnish him the information, and upon advice of their attorney to that effect, and the representation of Mr. Southworth to that effect, they furnished him the information, and that this information was about and concerning the matters and things for which they were indicted for using the mails to defraud with reference to the operation and promotion of the General Lee Interests, and they were then about to be tried upon this indictment.

Mr. Sherwin testified at length before the court, all of which is fully set out in the record, the above being the substance of his testimony, and it was agreed that Mr. Harry H. Schwarz, the other petitioner, would testify to the same facts.

It was further agreed, for the purpose of the record, that the government exhibits 1, 2 and 3, the same being the declarations of trust of the General Lee Interests No. 1, General Lee Interests No. 2, and General Lee Development Interests respectively, which are fully set out in the record, were introduced by the government in the trial of the case on its merits, and were identical copies of each of the documents, and are the same ones which the petitioners Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission. That the government's exhibit No. —, the same being the contract between the General Lee Development Interests, through its trustees as the first parties and Sherwin, Schwarz and Lebensen as second parties, of date April 12, 1922, and the same containing a copy of the agreement by and between R. A. Lee and

Sherwin and Schwarz concerning the compensation of the said Robert A. Lee for his services in said company (copy of which is also in the record) is the same identical contract of which the defendants Sherwin and Schwarz testified that they gave copies to John F. Southworth, and that said contracts were not of record, and that the last mentioned exhibit was introduced by the government in the trial of this case on its merits.

The plea in bar, or plea of immunity, was presented to the court, and a hearing was had thereon, both by the testimony of petitioners and the introduction of exhibits, and the court, after hearing the same, refused and denied said plea in bar and plea of immunity, to which action of the court the petitioners excepted and preserved their said exception by assignment of error.

Thereafter, a trial was had before the court and jury upon the merits of the case, and upon this trial, the petitioners read and presented their plea of immunity and plea in bar to the jury, and all of the testimony that was introduced before the court was again introduced before the court and jury, and the petitioners then requested the court to instruct the jury to return a verdict of not guilty in this case, under each of the counts in the indictment, which instruction was as follows:

"Gentlemen of the Jury: You are instructed to return a verdict of not guilty against the defendants Charles Sherwin and H. H. Schwarz upon their plea of immunity, and the form of your verdict shall be: We, the jury, find the defendants Charles Sherwin and H. H. Schwarz not guilty." (Tr. 130.) Which requested instruction was by the court refused, to which the petitioners excepted, and preserved their exception by assignment of error. (Tr. 130; 138, Assignment No. 4.)

Before the court charged the jury, petitioners request-

ed and moved the court to submit to the jury, in appropriate language, and in terms of law, the issue of immunity as raised by their plea in bar, filed in this cause, and permit said jury to pass on same separately and apart from the issue of "guilty or not guilty", as raised by the averments in the indictment and their plea of not guilty thereon, which motion the court refused, (Tr. 130-131) to which action the petitioners excepted and preserved their exception by assignment of error. (Tr. 138-139).

Before the court charged the jury, petitioners prepared special charges upon the plea and issue of immunity, and requested the court to charge the jury as therein set forth, as follows:

Requested Charge No. —

"You are instructed that, under the law, the Federal Trades Commission, or any of its duly authorized agent or agents, has the authority to demand of any corporation or common law trust, by making demand upon those natural persons in charge thereof, to answer any lawful inquiry so made by said Commission, or its said agent or agents, and to attend and testify, and to answer any lawful inquiry and to produce documentary evidence if in his power to do so in obedience either to the subpoena or lawful requirement of said Federal Trade Commission, and this authority such Federal Trades Commission and its duly authorized agent or agents possess under the law, even to the extent of requiring such natural persons to give such evidence or furnish such documentary evidence or other information that incriminates such natural person, and shows him or tends to show that he has been guilty of an offense against the laws of the United States. But in this connec-

tion, you are further instructed that such law would not be constitutional unless it further provided, as it does, that no such natural person, after having complied with such lawful demand of the Federal Trades Commission, and given testimony or evidence, or furnished documentary evidence or otherwise, or made answers to any lawful inquiries in obedience to such lawful requirement, shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he so testified or produced evidence, documentary or otherwise, in answer to such lawful demand as aforesaid.

"Now, then, bearing in mind the instructions hereinabove, if you find and believe from the evidence that the defendants, Charles Sherwin and H. H. Schwarz, in answer or compliance either of the subpoena or lawful demand of the Federal Trades Commission, or of one John F. Southworth, as the duly authorized agent of the said Commission, if you so find, and answered a certain questionnaire demanded by the said Federal Trades Commission for this said defendant to answer and furnish to said Southworth the books, records, letters, letter files, advertising matter, exhibit the physical assets of said companies to said Southworth, and generally informed said Southworth of the nature and scope of the business said companies were engaged in, and the kind and character thereof, and copies of the letters it was sending through the United States mails if any such were being sent, and generally, if you find and believe from the evidence that the defendants, Charles Sherwin and H. H. Schwarz, furnished information, documentary or otherwise, to said Southworth, or to the said Federal Trade Commission about any matter, thing or trans-

action charged against said defendant in the indictment herein, or about any matter, thing or transaction introduced in evidence against them in the trial of this case under the indictment herein; or, if you find and believe from the evidence that this defendant furnished to said Federal Trades Commission, in compliance with its lawful demand any evidence, documentary or otherwise, about any matter, thing or transaction tending to incriminate this defendant, or criminating him of the offense charged against him in the indictment herein, then, in either event, you are instructed that in such case the law has provided immunity for this defendant and he cannot be convicted of the offense charged against him in the indictment herein, and you will find the defendant not guilty on the ground that he is immune from prosecution, and conviction, and the form of your verdict will be:

“We, the jury, find the defendant not guilty on the ground that he is entitled to immunity under the law.”

Requested Charge No. ——

“The defendants, Charles Sherwin and H. H. Schwarz have filed herein their plea of immunity, which has been read to you by the court, which in effect is an application on the part of said defendants to have the jury determine whether or not their acts in giving testimony, information and documents of and pertaining to the business and operations of the General Lee Interests One (1) and Two (2) and the General Lee Development Interests to one John F. Southworth, agent of the Federal Trades Commission, as has been detailed in the evidence before you, constitutes, under Article 8836-A

to N, inclusive, immunity to them, and operates to prevent their conviction herein, and in this connection I charge you as follows:

"If John F. Southworth, who it is admitted was the duly constituted agent of the Federal Trade Commission, demanded, required and received of and from the defendants, Charles Sherwin and H. H. Schwarz, testimony, evidence and documents of, belonging to and connected with the operation of the business of the three (3) companies herein mentioned, and required them to answer questions with respect thereto, over the protests and without the consent of the said Charles Sherwin and H. H. Schwarz, and that the said defendants, Sherwin and Schwarz, refused to give said information, testimony and documents until the said Southworth had demanded same under and by virtue of the terms of Article 8836, et seq., then you will acquit the defendants upon their plea of immunity, and say by your verdict, 'not guilty.' "

Which said special charges the court refused to give, to which petitioners excepted and preserved their exception by assignment of error. (Tr. 131-133; 138-142. Assignment No. 5.)

After the testimony had closed, the court instructed the jury generally as to the issues, and upon the question of the petitioners' plea of immunity in this cause, charged the jury as follows:

"The Court: Now, there has also been introduced in this case, gentlemen, a special plea of the defendants Sherwin and Schwarz, claiming immunity from prosecution because of certain transactions had before the Federal Trade Commission, the nature of which are set forth in detail in the evidence stipulated in the case, and which need not be detailed at

this moment. With respect to that plea as indicated by the court the other day in the judgment of the court, there being no question of facts involved, and counsel being of the opinion that there is no question of facts involved, there is no conflicting evidence, it being purely a question of law presented, the court therefore will instruct you, and does instruct you, to return a verdict in favor of the Government and against the defendants with respect to the plea of immunity, and I have prepared for your use a special verdict on the question of the plea of immunity, and have indicated that it is to be returned by you for the Government and against the defendants by direction of the court, and I will ask your foreman before returning into court to sign that verdict." (Tr. 134.)

To which charge in this cause, through their counsel, the petitioners duly excepted, and preserved their exception by assignment of error No. 3. (Tr. 137-138.)

The jury returned a verdict of guilty against petitioners Charles Sherwin and Harry H. Schwarz on each of the six counts of the indictment, which verdict was accepted by the court; (Tr. 58-61) and the court sentenced Charles Sherwin and Harry H. Schwarz each a term and period of five years in the penitentiary on the first count of the indictment; five years on the second count of the indictment; five years on the third count of the indictment; five years on the fourth count of the indictment; five years on the fifth count of the indictment, and two years on the sixth count of the indictment; the first and second counts to run consecutive, and the third, fourth, fifth and sixth counts to run concurrent on each of the defendants with the first and second counts, and a fine of one thousand dollars on each of the first five counts in the indictment and ten thousand dollars on the sixth count. (Tr. 60.)

The petitioners prosecuted their writ of error to the Circuit Court of Appeals for the Fifth Circuit. (Tr. 143-150.)

In the trial court the petitioners duly preserved, and in the prosecution of their writ of error, complained of the action of the trial court, in this:

2.

"The court erred in overruling and in not sustaining their plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, which said plea is made a part of this assignment as fully and as complete as though copied herein." (Tr. 137.)

3.

"That the court erred in peremptorily instructing the jury to return a verdict against the defendants on the issue of their plea in immunity, and in using the following language with respect thereto:

"'Gentlemen of the jury: You are directed to return a verdict against the defendants Charles Sherwin and Harry H. Schwarz on their plea of immunity.'

"And the court thereupon caused to be prepared and executed by said jury the verdict against these defendants with respect to said immunity plea, which said verdict of the jury is made a part hereof as fully and complete as if copied herein." (Tr. 137-138.)

4.

"The Court erred in refusing to direct the jury to return a verdict of not guilty against each of these defendants on their plea of immunity as was

requested by defendants in writing, which requested instruction is as follows:

"Requested Instruction No. —

" 'You are instructed to return a verdict of 'not guilty' against the defendants Charles Sherwin and Harry H. Schwarz upon their plea of immunity, and the form of your verdict shall be: We, the jury, find the defendants Charles Sherwin and H. H. Schwarz not guilty.' (Tr. 138).

5.

"The court erred in refusing to instruct the jury in appropriate language and in terms of law as to the rights of defendants with respect to the issue of immunity as raised by their plea in immunity and the evidence concerning same, as was set forth in defendants' requested charges numbers and as heretofore fully set out in the record." (Tr. 139-142.)

On the 11th day of March, 1924, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court. (Tr. 167-175.)

The petitioners, in due time, filed their petition for a rehearing (Tr. 177), which was by the court denied on the 4th day of April, 1924. (Tr. 192.)

**REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT.**

The trial court erred in overruling, and in not sustaining petitioners' plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, and in failing to instruct the jury to return a verdict of not guilty, as requested by a motion and in a special

charge; (Assignment of error Nos. 2 and 4; Tr. 137-138) and the Circuit Court of Appeals erred in affirming said action of the trial court, because it was not denied by the government, and the record conclusively established that petitioners were summoned (or subpoenaed) by the Federal Trade Commission, and they did answer a lawful inquiry of the Federal Trade Commission, and there was demanded of them by the Federal Trade Commission, and they were compelled by the Federal Trade Commission, under threat, to produce documentary evidence, and they did produce the same, in obedience to the summon (or subpoena) or lawful requirement of the Commission, and the evidence given, information furnished and documents produced were concerning the matters and things about which they were later indicted in this case. Immunity flowed to these petitioners by virtue of the statute, and they should not have been prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing about which they testified or produced evidence.

The statute gives the Federal Trade Commission power and authority to demand and compel the production, by subpoena, or by lawful requirement, or by lawful inquiry, evidence, documentary or otherwise, and a person is not excused from giving or furnishing this evidence for the reason that it might tend to incriminate him. If the Federal Trade Commission, by subpoena, or without subpoena but by lawful inquiry, or without subpoena but by lawful requirement, demands and receives such evidence, the person so called upon, who furnishes the same, is immune from prosecution for, or on account of any of the transactions, matters or things about which he testifies or produces such evidence. The demand for and compelling the production of, and the receiving of evidence, documentary or otherwise, or the mere acquisition of evidence, documentary or otherwise, by the Federal Trade

Commission, through subpoena or lawful requirement of the commission, within itself gives immunity to the person for or on account of any of the matters and things about which he may testify or furnish evidence.

2.

The trial court erred in peremptorily instructing the jury to return a verdict against petitioners on the issue of their plea of immunity (Assignment No. 3; Tr. 137) and in charging the jury in substance that the plea of immunity was a question of law, and that he, the court, would instruct the jury to return a verdict for the government and against petitioners on that issue. (Tr. 134.) And the Circuit Court of Appeals erred in affirming the action of the trial court, because the record discloses, without contradiction, that the Federal Trade Commission, through Mr. Southworth, demanded of petitioners, and compelled them, through fear of penalties of the law, to answer a questionnaire, and furnish evidence, documentary and otherwise, to the Federal Trade Commission, and said evidence furnished, and the answers so made, were about and concerning the matters for which they were later indicted and were then about to be tried. The statute grants immunity from the penalties or forfeitures for, or on account of the transaction, matters or things concerning which they testify or produce evidence to the Federal Trade Commission in response to a subpoena or lawful inquiry, or in obedience to a lawful requirement; and the court should not have peremptorily instructed the jury to return a verdict in favor of the government and against petitioners on their plea of immunity.

3.

The trial court erred in refusing to instruct the jury in appropriate language, and in terms of the law, as to the

rights of petitioners with respect to the issue of immunity as raised by their plea of immunity, and the evidence concerning same, as was set out in the special charges heretofore copied in this petition (Assignment of error No. 5; Tr. 138-142) because the statute gave petitioners immunity from penalties and forfeiture for, or on account of any transactions, matters and things concerning which they might testify or produce evidence documentary or otherwise before the Federal Trade Commission. The petitioners made their plea and claim of immunity in writing before the court, and later before the court and jury; they introduced evidence thereon and same presented a question of fact, and the court should have given petitioners' requested charges as the same properly presented the law applicable to the issues.

4.

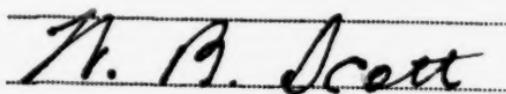
The Circuit Court of Appeals erred in its opinion, wherein it said, "The evidence furnished in compliance with a request or demand by an examiner of the commission, without the issuance of a subpoena, is not, within the terms of the provision of the statute," because this is, in our opinion, an incorrect interpretation of application of the law. Immunity is given persons who appear before the Federal Trade Commission and testify under oath, or furnish evidence, documentary or otherwise, or who furnish evidence without regard to subpoena or oath to the Federal Trade Commission in answer to any lawful inquiry of the Federal Trade Commission, or who furnish evidence, documentary or otherwise, without regard to subpoena or oath, to the Federal Trade Commission, in obedience to a lawful requirement of the commission. The Circuit Court of Appeals says that the test as to whether immunity flows or not is—did the subpoena issue? Did the witness appear in obedience to the subpoena and testify under oath? The statute says a person can be pun-

ished who fails or refuses to attend and testify, or answer a lawful inquiry, or produce documentary evidence (1) in obedience to a subpoena, (2) in obedience to any lawful requirement of the commission. If a person answers any lawful inquiry without a subpoena, or testifies, or produces documentary evidence, either in obedience to a subpoena or in obedience to a lawful requirement of the commission, he should be equally immune from penalties or forfeiture for or on account of any transactions, matters or things concerning which he may testify or produce evidence.

Your petitioners believe that the judgment of the trial court, as well as the judgment of the Circuit Court of Appeals for the Fifth Circuit, affirming the judgment of the trial court, is erroneous, and that this Honorable Court should require the case to be certified to this court for review and determination upon the questions raised in conformity with the provisions of the Act of Congress in such cases provided.

Your petitioners, therefore, pray that a writ of certiorari be issued by this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said last named court to certify and send to this court, on a date certain, a full and complete transcript of the record of all proceedings of the Circuit Court of Appeals in this cause, to the end that the cause may be reviewed and determined by this court as provided in such cases; and that your petitioners may have such other and further relief and remedy in the premises as this court may think appropriate and in conformity with law, and that the judgment of said Circuit Court of Appeals in this

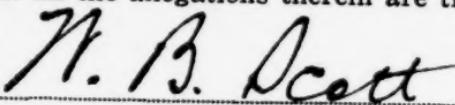
cause be reversed and said cause dismissed by this Honorable Court.



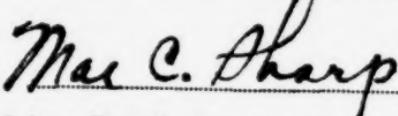
Fort Worth, Texas.
Counsel for Petitioners.

THE STATE OF TEXAS,
COUNTY OF TARRANT.

I, W. B. Scott, being duly sworn, on oath state that I am one of the counsel for petitioners, Charles Sherwin and Harry H. Schwarz in the foregoing petition for certiorari; that I prepared said petition and am familiar with same, and that all the allegations therein are true, as I verily believe.



Subscribed and sworn to before me, this 4th day of May, 1924.



Notary Public, Tarrant County, Texas.

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1000. 1. 28.

PETITIONER'S BRIEF

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1923.

CHARLES SHERWIN and HARRY H. SCHWARZ,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

(We will set out the indictment against the Petitioners and others, in full, as well as the testimony given by petitioners and the Government, and the agreed statement as to the record, as we deem it necessary for the Court to fully and completely examine and satisfy itself that Petitioners furnished evidence, documentary and otherwise to the Federal Trade Commission about, and concerning the things, matters and transactions they were later indicted for, and were compelled to stand trial for on said indictment, which is this case.)

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

That an indictment was filed on the day of , 1923, in the United States District Court for the Northern District of Texas, and in the Fort Worth Division, against the petitioners and others, which indictment contained six counts. The first five counts charge a violation of Section 215 of the Criminal Code of the United States, and

the sixth count charged a violation of Section 27, of that code, which indictment was as follows:

(We will omit such formal parts as are unnecessary in the consideration of this case.)

"That heretofore, and prior to the several acts of using the United States Mails hereinafter set forth, Robert A. Lee, Charles Sherwin, Harry H. Schwarz, William Schloss, Phillip Goldstein, and otherwise called Ralph P. Gibson, Robert Ball, Jr., Nathan H. Sang, otherwise called N. J. Lang, Max Hirsch, otherwise called M. Haas, and Walter Marks, (all hereinafter in this indictment called defendants) had devised and intended to devise a scheme and artifice to defraud and to obtain money and property by false and fraudulent pretenses, representations and promises from Alice M. Kane, A. L. Skanas, J. H. Bohmfolk, A. S. McDougal, Violet R. Bowen, and various and divers other persons whose names are to the Grand Jurors unknown, and the public generally (a class of persons not susceptible by reason of their great number, and want of information on the part of the Grand Jurors of all being named herein), said persons being hereinafter referred to as the persons to be defrauded, and to obtain money and property from said persons to be defrauded by means of false and fraudulent pretenses, representations and promises; the said scheme and artifice being in substance as follows, to-wit:

"That the said defendants would organize and promote divers oil companies and sell the shares thereof, to-wit: General Lee Interests No. 1, divided into 1,250 shares of the par value of \$20.00 each; General Lee Interests No. 2, divided into 900 shares of the par value of \$20.00 each; General Lee Development Interests, divided into

250,000 shares of the par value of \$1.00 each, and divers other similar concerns to the Grand Jurors unknown, all under the guise and in form of trust estate and with the principal offices at Fort Worth, Texas, for the pretended purpose of engaging in the production and sale of oil and the sale of oil and gas leases and engaging in the oil business in general, for profit, and that they would issue large amounts of shares or certificates of beneficial interest in said companies and that they would sell the same to any and all of said persons to be defrauded whom they could induce to purchase said shares or certificates by making false and fraudulent representations, pretenses and promises concerning said companies and also as to the standing, character and qualifications of the defendant Robert A. Lee, and concerning very large dividends and profits at an early date to their shareholders of certificate of interest holders and that such false and fraudulent representations, pretenses and promises would be made by said defendants and their sales agents, both orally and by written and printed matter advertisements and publications in order to induce said persons to be defrauded to purchase beneficial interest in said companies, such representations to be made through and by means of newspapers, magazines, and other publications, and in form of posters, circulars, pamphlets and circular letters and personal correspondence, all of which said matter was and would be sent to said persons to be defrauded, for the purpose of inciting and inducing said persons to purchase said shares or beneficial interests in said companies, and to pay over their money and properties to the said defendants in order that they, the said defendants, might fraudulently appropriate and

convert large portions thereof, to their own use and benefit.

"And the said defendants planned and schemed that for the purpose of so inciting and inducing said persons to be defrauded to deliver over to them, the said defendants, their money and property, they, the said defendants, would make false and fraudulent pretenses, representations and promises, in substance and in effect as follows, to-wit:

"(1) That the said companies were under personal and complete management and direction of General Robert A. Lee; that the said General Robert A. Lee was a descendant of Robert E. Lee, the great Confederate general, and of the historic Lee family; that as General Robert E. Lee gave his life to the cause of the South so now was General Robert A. Lee giving his life to the oil industry and the great cause of humanity; whereas, in truth and in fact, as the said defendants then and there well knew the said companies were not under the personal and complete direction of the said Robert A. Lee but were controlled and dominated by the defendants Charles Sherwin and Harry H. Schwarz, who had procured and associated with themselves the said Robert A. Lee for the purpose of using the historic name of the Lee family, and his pretended relationship with the great Confederate general, Robert E. Lee in order to appeal the more strongly to the persons to be defrauded and thereby incite and induce the said persons to be defrauded to purchase the shares or beneficial interests in the said companies; and the said Robert A. Lee was not in fact a descendant of the said Confederate General, Robert E. Lee, nor of the historic Lee

family, nor was he giving his life to the oil industry or the cause of humanity, but was only helping to promote a fraudulent scheme.

"(2) That the said General Robert A. Lee was known far and wide as a great geological engineer; that he was a man of long and successful experience as a petroleum geologist; that he was in fact a miracle man of geology; that he had made fortunes for others by the location of scores of producing oil wells in California; in Oklahoma, and in various fields of Texas, and among geological men was revered and admired; Whereas, in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee was not known far and wide as a great geological engineer nor as a geological engineer at all and he was not a man of long successful experience as a petroleum geologist or of any experience whatever as such geologist; he was not in fact a miracle man of geology nor had he made fortunes for others by the location of scores of producing oil wells in California, Oklahoma, and Texas, or in any of those states, nor was he revered or admired among geological men or of any repute whatever among such class of men but was in fact a laborer without expert knowledge and never known to the public as a geologist.

"(3) That the said General Robert A. Lee had been in the employ of the richest and biggest interests whose names are a by-word in the financial world and had helped thousands to make fortunes; that he had never bought a piece of acreage for a client, that had not been productive and had never made a location for an oil well that had not come in a successful producer of oil; Whereas, in truth and in fact, as the defendants

then and there well knew, the said defendant Lee had not been in the employ of the richest and biggest interests known to the financial world or helped others to amass fortunes but in fact loaned his name to said scheme for \$11.50 per week, and had theretofore been employed as janitor in the state capitol of the State of Idaho, and was not and is not a locator of oil wells.

"(4) That the said General Robert A. Lee, in behalf of General Lee Interests No. 1, had invaded the Mexia fields and had found the Mexia mother pool and was offering his friends the opportunity of enlisting in his young army of future millionaires; that he, the said General Robert A. Lee, who had never located a dry hole, was offering this chance to profit with him in his mother pool leases; Whereas, in truth and in fact, as the said defendants then and there well knew the said defendant Lee had not found the mother oil pool in the Mexia field or any other oil field, and the alleged army of millionaires was only a myth invented by the said defendants in promoting the said scheme, and the said defendants had no opportunity of profit to offer to anyone in any alleged pool leases, but in fact were promoting wild-cat and semi-wild-cat territory procured by the said defendants at about \$5.00 per acre.

"(5) That he, the said General Robert A. Lee, for General Lee Interests No. 1, had purchased three leases in the district where he had found the said mother pool; that the said three leases aggregated 200 acres of land; that these 200 acres were to cost only \$25,000 (twenty-five thousand dollars), and that he had already paid a portion thereof himself that it was only through his personal influence that he was able to get

this marvelous acreage at such a ridiculously low price and that he was offering his friends the opportunity of sharing his good fortune with him; Whereas in truth and in fact, as the said defendant then and there well knew, that he, the said Robert A. Lee had not himself purchased the said three leases composing the acreage for General Lee Interests No. 1, and had not paid Twenty-five Thousand Dollars therefor, nor any portion thereof himself, and it was not true that this acreage was acquired at a ridiculously low price through his personal influence and he was not offering his friends the opportunity of sharing good fortune with him but only to invest their money in a questionable and highly speculative enterprise.

"(6) That this was the first time General Lee had asked his friends for money to assist him in his operations; that he was positively not a promoter; that he knew nothing about these so called promotion schemes and wanted to know even less about them; that he was just a plain, honest-to-goodness man who had been the instrument used by the big companies to locate oil; that he has enough money to provide for himself and if he had made for himself only a percentage of the profits that he had made for others he would be worth millions and that now he was determined to let the world share in these riches and vast wealth that would be forthcoming when the drill should prove that his knowledge of the oil structure of Texas was far superior to that of any geologist who had ever traced a structure; Whereas in truth and in fact, as the defendants well knew, the said Robert A. Lee had joined in this promotion scheme and loaned his name and alleged family history to the

same to be used by the said defendants in the promotion of the said scheme; and the said Robert A. Lee had never been used by big companies to locate oil wells, and had not made millions for others and had no superior knowledge of oil structure or any scientific knowledge thereof whatever, but was an impecunious old man who had joined the other defendants herein in the said scheme and artifice for a small sum which they were willing to pay him for the fraudulent use of his name in the promotion of the said companies.

"(7) That the tremendous possibilities of profit from the leases in said General Lee Development Interests No. 1, staggered the imagination and appalled human comprehension, and that these tremendous profits, these royal riches would be paid just as surely as oil was found on these adjoining leases and that it would be a wonderful day for every man who had pinned his faith on General Robert A. Lee; Whereas in truth and in fact, as the said defendants then and there well knew, the representations as to tremendous possibilities or profit from the leases in General Lee Development Interest No. 1, staggering the imagination and appalling human comprehension was a highly exaggerated, inflammatory and fraudulent statement made only for the purpose of inciting and inducing the said persons to be defrauded to part with their money and property in the purchase of shares or beneficial interests therein.

"(8) That the said General Robert A. Lee Interests No. 1 was quickly oversubscribed; that Yankees and Rebels alike had swamped the said General Robert A. Lee with orders and purchased every interest in his leases within fifteen days; that for this reason he had organized General Lee

Interest No. 2 for those too late to get in on his No. 1 and was offering positively the only chances to get in on these lease interests; Whereas in truth and in fact, as the said defendants then and there well knew every interest in General Lee No. 1 had not been purchased within fifteen days nor at any time, but a large number of shares remained unsold and Interests No. 2 was organized only because the said defendants believed themselves able thereby to incite and induce the said persons to be defrauded, to purchase further shares and so to defraud the said persons out of their money and property.

"(9) That the letters written to the said General Robert A. Lee by his friends telling of the great confidence and of the faith they had in him had made his heart glad and had acted as an inspiration for him to attempt bigger things and had been the cause of his organizing the General Lee Development Interest; that in this third enterprise also he had made one decision first, namely, to place his name and the great honor of it behind the organization; Whereas in truth and in fact, as the said defendants then and there well knew that whatever letters were written to the defendants expressing confidence and faith in them or either of them was due to the false and fraudulent representations, herein set forth and only inspired the defendants to make further false and fraudulent statements and the said companies were organized for the sole purpose of obtaining money and property from the persons to be defrauded by false and fraudulent pretenses, representations and promises.

"(10) That the first selection of the said General Robert A. Lee for the said General Lee De-

velopment Interests was a spot in North Texas where he had discovered what he believed to be the apex of the most promising oil structure in all Texas, the goal for which oil men had been seeking for years; that this structure was so definite and pronounced that he had named it the Roanoke Uplift in honor of the little town of Roanoke, Texas; that he was planning to drill his first well on this remarkable structure and had contracted for 6,183 acres of land in that vicinity, which he considered the best prospective oil lands in Texas; Whereas in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee had not discovered the apex of the most promising oil structure in all Texas not any promising structure whatever; and the said structure was not definite and pronounced and was not of any reasonable oil prospects, but in fact was of a most unpromising wildcat character condemned by reputable geologists.

"(11) That the plans carried out by the said General Robert A. Lee stamped the enterprise of the General Lee Development Interests unquestionably as one of the most ambitious and at the same time certain of fulfillment that the oil world had ever known; that the said General Robert A. Lee was to drill ten wells for the said General Lee Development Interests and was giving an iron-clad pledge and guarantee to get production for his army of investors; that this was a plain and positive guarantee that before he completed the enormous task he had set out to accomplish oil would be running into the pipe lines for benefit and enrichment of his many followers; Whereas in truth and in fact, as the said defendants then and there well knew, the plans announced by the

said defendants in the name of Robert A. Lee were not the most certain of fulfillment that the oil world had ever known or certain at all, but were falsely devised with the intent and purpose of defrauding the public and the said pledge and guarantee that ten wells would be drilled and that production would be obtained and oil running into the pipe lines was made and advertised only for the purpose of more readily inciting and inducing the said persons to be defrauded to deliver to the said defendants their money and property.

And the Grand Jurors further say, present and find that each and every of the pretenses, representations and promises made, and planned to be made by said defendants were false and untrue, and at all the times mentioned herein were known by the defendants, and each of them, to be false and untrue, and to be made by the said defendants with the purpose and intent of inducing the said persons to be defrauded to pay to them, the said defendants, large sums of money for shares or certificates of interests of the said companies, and which said shares or certificates of interests were then and there of much less value than the persons to be defrauded were to pay for the same, all of which the said defendants then and there well knew.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present and find that the said defendants, so having as aforesaid devised the said scheme and artifice to defraud, in and for executing the same, and in attempting so to do, did unlawfully, wilfully, feloniously and knowingly on the 13th day of April, 1922, at Fort Worth in the County of Tarrant, State of Texas, in the Division and District aforesaid, and

within the jurisdiction of this Court place and cause to be placed in the Post Office of the United States at said Fort Worth, a certain letter enclosed in a postpaid envelope addressed to Miss Alice M. Kane, 14 Warren Street, Roxbury, Mass., which said letter is in substance as follows, to-wit:

"Robert A. Lee,
Geologist.
Suite 505 Burk Burnett Building,
Fort Worth, Texas,
4-13-22.

Miss Alice M. Kane,
14 Warren Street,
Roxbury 19, Mass.

Dear Miss Kane:

I wrote you a few days ago telling you that I was organizing General Lee Development Interests. I also told you some of the reasons. This is the third and probably the last opportunity my friends and followers will have to make further investments with me.

In my letter to you I sketched roughly my plans. I advised you not to make any further investments in oil securities until you had heard from me, and now I am going to tell you why I asked you to wait.

Before I tell you of my plans for the General Lee Development Interests you will doubtless want to know something regarding the General Lee Interests, in which you are interested with me.

Our leases in the northwest extension are looking better each day, due to the fact that almost daily new locations are being made and derricks going up. Many of these have had wonderful

showings of gas and oil at different depths, and the logs of each that I have seen check up almost identically with those of the biggest wells drilled in the Mexia field proper, and I think it will be just a matter of time before one of these wells will come in. When one does make a producer our leases will be worth many times their present value.

The only unfortunate part of the whole matter, which requires our patience, is that we are not drilling these wells ourselves. If I were supervising the drilling of them I am certain that I would be making much speedier headway. I am satisfied with the way they are being drilled and managed, however, and it is sometimes better for others to drill more slowly.

The best news that I received last week was about the Davidor well. At a depth of approximately 1140 feet this well was reported to be making six million cubic feet of gas. A gasser of this size at such a shallow depth will, of course, pay, but not in proportion to what a good oil well would, and I have been informed that they will continue drilling for oil. This well, of course, can be plugged back at any time but I predict that it will never be done because I think that when they reach the depth at which they will find the Woodbine sand they will bring in the biggest oil well that has ever been brought in, in Mexia.

All of this news I am sure is of as much interest to you as it is to me. It merely shows that up to date my predictions have all proven true, and I want you to always bear in mind all that I further say.

Remember, I have never located a well that did not prove a producer, and I have never selected a piece of acreage that did not prove productive.

It is needless for me to further recount to you the anxious and successful years that have combined to make a lifetime full to the brim of activity and accomplishment. It is needless for me to tell you of this. When I tell you face to face that my heart and soul thrill with the anticipation of the greatest achievement that is to come, you can readily picture yourself, the success that is in store for General Lee Development Interests.

The letters you have written me in the past telling me of the confidence and of the faith you have in me certainly make my heart glad. The words you have written me have acted as an inspiration for me to attain bigger things. I have hundreds and hundreds of letters before me now which mainly have been the cause of my organizing the General Lee Development Interests.

When I decided to form the General Lee Development Interests, as I did when I organized the General Lee Interests Nos. 1 and 2, I made one decision first. It was this—I would put my name and the great honor of it behind the organization. That was my first step. You know how much the name of Lee means to me. The name Lee stands for every thing that is true and honorable and courageous in life. It is a name, that has won distinguished honor in this nation. It is a name that says "Honor first."

When I gaze back on the pages of history and meditate on the achievements of the family of Lee, their deeds come up before my eyes in what

is really a pageant of achievement. I see Richard Henry Lee pleading for liberty alongside of Patrick Henry in the Virginian assembly; I see the famous "Light Horse Harry" Lee giving impetus to American Independence by his courage and bravery during the Revolutionary war; I see our own General Robert E. Lee at Gettysburg, staunch and unafraid; I see the accomplishments of countless hundreds of Lees adding luster to the brilliant events of our history.

I can see, as if it were just yesterday, when General Robert E. Lee leaving my father's farm in Tennessee, called me to him, placed his hands on my shoulders and said: "Bobby, keep the name of Lee always first in your mind. The name of Lee is a name of honor. It has never been dishonored and stands without a stain. Keep it so, Bobby. Be square and honest, for there is a reward for clean dealing that can not be purchased with wealth."

These words have ever rung in my ears. They have been etched into my heart and have been uppermost in my business dealings with my fellow man. To that principle I attribute more than to any other one thing the measure of success that I have attained in my profession.

And it's the spirit that I held fast to when I decided to give my name and my time, my purse and my honor, to General Lee Interests Nos. 1 and 2, and to the General Lee Development Interests, which I have just organized. You know that I am a man well along in years. You know that I do not crave the wealth of this world, rather would I have my name emblazoned upon the hearts of my fellowmen throughout this nation that are striving to get ahead in the world.

Money can mean but little to me. I have enough to permit me to live in comfort the rest of my days, but I will never rest, I will never quit my geological work in the oil fields of the great Southwest, until I have made it possible for my hundreds of associates, friends and followers to share in the most marvelous wealth in the world that comes from the successful drilling of true oil structures.

I come to you again with the clean hands of a man who has been trusted, and who has never broken faith with his followers, a man who is successful, a man who has made money for himself and fortunes for others. My thousands of friends, associates and followers insisted on my starting General Lee Development Interests and letting them join me. I am firmly convinced of the tremendous possibilities offered in the Mid-Continent fields where there are many undiscovered structures yet to be located and drilled.

Now as to my plans:

I will drill ten wells for oil.

This is not a meaningless array of words; it is a promise reverently given, and one that will be strictly and conscientiously and honorably adhered to.

The first well will start soon, and the others will come rapidly after it. There will not only be one chance for riches, but many of them. And more even than the elaborate and comprehensive drilling program I have mapped out. I am making the important declaration.

I positively guarantee to get production.

That's what I mean in just so many words. I will positively get production. Before I have com-

pleted my remarkable campaign of development, I give you my ironclad guarantee that oil will be running into the pipelines for the benefit and enrichment of my followers.

You know that I have never made a promise that I did not keep; I shall keep this one. The determination to succeed in this enterprise has gripped me and holds me steadfast to my task.

If I could take you out in the field with me, where I am most at home, I would take you to the finest oil structure in my opinion in the whole United States. It is a structure that I have named in honor of the little town of Roanoke, Texas, where I have lived for a long time, and where I know most everyone and everyone knows me.

This is a structure that would delight and please you, as it gladdened me. I believe that the Roanoke Uplift is the best chance for oil in Texas today. I shall do my level best to bring in on this marvelous, symmetrical oil structure the biggest gushers that North America has ever seen.

As it told you I would do in my last letter, I am writing you first. I am letting you know of the organization of General Lee Development Interests because you responded so freely and so readily upon receipt of my first invitation; because you are my partner in my other ventures.

When I tell you that I am going to drill ten wells, and when I tell you that I am positively going to get production for you, you also know that you can further bank upon my word. I have never broken faith with you, and you know that I never will.

I want you to take advantage of this offer at

once. If you can not make payment of all of the interests that you will want you may send me your check for as much as you can, and I will reserve more for you and you can pay for them at a later date. The point is that I want you interested in every oil venture that I go into and, as I said before, this will probably be my last, and there is no doubt that it will be the biggest and most stupendous drilling campaign ever carried on before in the Mid-Continental oil field by any individual or company whose capitalization is only \$250,000.

The enclosed application blank is for your convenience. Wired reservations will be held until your letter has had time to reach me. I will await an answer from you.

Faithfully yours,
RAL-H. (ROBERT A. LEE).

P. S.—Remember these interests are only \$1.00 each. You may take all that you can conveniently carry."

and which said letter was to be sent and delivered by the postoffice establishment of the United States to the addressee thereof, and at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter and circular was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said de-

fendants, on May 19th, 1922, at Fort Worth aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, and allegations concerning which in said first count are incorporated, by reference thereto, in this Court as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter, addressed to one Alice M. Kane, 14 Warren Street, Roxbury 19, Mass., of the tenor following, to-wit:

“General Robert A. Lee
Geologist

Edwards Building

Fort Worth, Texas, May 19, 1922.

Miss Alice M. Kane,

4 Warren St.,

Roxbury 19, Mass.

Dear Miss Kane:

A few days ago I received your telegram reserving 300 additional interests. I did not answer this wire. I was awaiting your check and letter.

Today I received your check for \$100.00 as part payment on these interests with the notation that you will pay the balance some time in June, which is, I assure you, satisfactory. This will make in all 500 interests that you will have.

I certainly enjoyed reading your letter, and am glad to know that you feel that you could

confide in me. Do not hesitate to write just the way you feel. Anything you tell me, I assure you, will be treated as strictly confidential.

Apparently you are not very well versed in the oil business, and just anything that you want to know, I assure you, will be explained to you in detail.

The spudding in of a well means the commencing of actual drilling. Many leases in the oil fields are secured on drilling contracts. As an example, when we get a well in Roanoke on our 6000-acre tract we will not care to drill all of the balance of this and ourselves, but will want some of the larger companies to drill part of it for us. We will let many so-called drilling contracts, and in each case we will give them a specified time in which they have to start actual drilling.

As an example—say we give one of the companies a drilling contract to drill on a 50-50 basis —this is, they take 50% of the oil, and give us 50% of the oil, they to pay the actual cost of drilling on a 40-acre tract. Now, in our contract we will specify that they will have to start actual drilling within a period of thirty days from that date. Sometimes it will be impossible for them to get their derrick erected in time for the commencing of this drilling. In a case of this kind, rather than lose their contract they will move a small rig out to the lease, which we call a spudding machine, and spud in so that they will not have to forfeit their contract. In other words, it means as I told you above, merely the commencing of actual drilling.

Now, Miss Kane, you will probably want more than 500 interests before they have all been sold.

You will not necessarily have to pay all of this amount in June, and if you would care to have 1,000 of them I would be pleased to hold them for you, and you may make payments in July and in August, and regardless of what price they may be selling for at those dates, yours will be issued to you at their present par value.

With my very kind regards, I am
Faithfully yours,
RAL:EL. (Robert A. Lee)"

That at the time of placing and causing to be placed the said letter in the postoffice at the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said defendants on May 25th, 1922, at Fort Worth, aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this Court as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there to be sent and delivered by the postoffice establishment

of the United States to another of said persons to be defrauded, that is to say, a letter, self addressed envelope to the defendant Robert A. Lee, application blank for interests in General Lee Development Interests and also a certain booklet or folder concerning "The Honor of the Lees" addressed to one A. L. Askanas, 704 Pantages Bldg., Los Angeles, Calif., of the tenor following, to-wit:

"General Robert A. Lee
Geologist

Edwards Building

Fort Worth, Texas, May 25th, 1922.

Mr. A. L. Askanas,
704 Pantages Bldg.,
Los Angeles, Calif.

Dear Mr. Askanas:

At the request of many of my friends, I had a little booklet—"The Honor of the Lees"—printed a few weeks ago. I only had a very few of these made at that time and sent them to those of my friends who wanted one. It seems that every one of my friends to whom I sent this booklet must have told their friends, nearly everyone in the country who has not received one has written me asking me to send one to them.

Now, I don't remember whether I sent you one or not, but anyway I want you to have one before they are all gone again, so to make sure I here-with enclose you one.

I want you to read every word I have written—I am sure you will—those lines never grow old to me—I never tire of recalling the great and valorous deeds of the Lees, and I am sure you are equally proud of the part they have played

in the founding of this great and glorious nation of ours. Let your children read and study it. Let the name of Lee be an inspiration to them to attain the higher ideals, and may it be one means of making better men and women of them, patriotic and loyal citizens, such as every Lee mentioned in its pages.

I am going right along now with my development plans. My derrick is now almost completed. I am letting a contract for the drilling, and actual operations will be commenced now without delay.

Our first well is to be drilled right in the center of our immense 6,000-acre tract, which gives us absolute control of this entire field.

Operators now realize the value of this tract to the extent that already I am receiving numerous bids for many of them to drill small tracts on a 50-50 basis. In fact, one of my followers states that he will be down next week to make me an offer to drill part of this lease.

Just as soon as this well is under way, I will arrange to start our second and third wells in some of the other mid-continental fields. As I have told you before, nine other wells are to follow rapidly until I have finished this stupendous campaign, and I positively guarantee production.

I have sold more than half of this present issue now, and if you have decided how many more of these interests you will want, I want you to write me at once so that I can take care of you. Regardless of how many of these interests I am now holding for you, and whether or not you are in a position to pay for them now, I want you

to reserve all that you will ever want, because otherwise I will not be able to protect you.

I am enclosing you another application blank, and want you to attend to this matter today.

I am going to keep you advised at all times as to our development, and ask you to write me from time to time and ask me anything you want to know, because I am always glad to hear from you.

With my kindest regards, I am

Faithfully yours,

RAL-M

ROBERT A. LEE.

P. S. Please notify me by return mail when you receive this booklet."

said envelope having the following printed thereon:

"General Robert A. Lee,
Edwards Building,
Fort Worth, Texas."

said application blank being in words and figures as follows:

"Application Blank
General Lee Development Interests
Edwards Building, Fort Worth, Texas.

Date.....

General Robert A. Lee.

Dear Sir:

I desire to become a member of your General Lee Development Interests and enclose herewith the sum of \$..... in full payment for..... interests.

It is my understanding that these interests are fully paid and non-assessable, and that I am to share pro rata and in proportion of my investment,

in all profits which may accrue from the sale of oil or gas, or any properties now owned or which may be hereafter acquired by these interests.

\$ 10.00 buys	10 interests
50.00 buys	50 interests
100.00 buys	100 interests
300.00 buys	300 interests
500.00 buys	500 interests
1,000.00 buys	1,000 interests

Name

Street or P. O. Box

City State

said booklet or folder concerning the honor of the Lees being an illustrated and biographical sketch of the historic Lee family, that at the time of the placing and causing to be placed the said letter together with the said enclosures in the post-office of the United States as aforesaid, the defendants then and there well knew that said letter and enclosures was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that said defendants, on June 20th, 1922, at Fort Worth, aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises, described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count as fully as if they were here

repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowing and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States, there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter addressed to one Alice M. Kane, 14 Warren St., Roxbury, 19, Mass., of the tenor following, to-wit:

"General Robert A. Lee,
Geologist
Edwards Building
Fort Worth, Texas, June 20, 1922.

Miss Alice M. Kane,
14 Warren St.,
Roxbury, 19, Mass.

Dear Miss Kane:

I am sending you under separate cover a booklet I had printed for you and other of my friends. The booklet tells the story of the Declaration of Independence. This great document of human liberty should be in every home in America, and in my opinion it ranks second in importance to but one other, the most sacred, The Holy Bible.

The Declaration of Independence, though simply written, tells the story of political freedom, civic liberty that has endured and will endure for hundreds of years, written as it was by men thoroughly American in ideals, hopes and aspirations.

Can you blame me for the thrills that stir my heart when I look back and read of my own forebears, Richard Henry Lee and Fitzhugh Lee, who took the first steps in the early Colonial struggle for freedom? My heart warms with the inspiration

of it, and I know that every other good American feels the same.

We find in the second paragraph—"That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness"—'and the pursuit of happiness.'

Man can not have happiness without conscience, no matter how much wealth he may possess, but with a clear conscience and sufficient money with which to purchase his worldly needs, there is no reason why every one can not enjoy happiness.

A man is as good as his word.

I am going to take this opportunity to tell you what progress I have made in the short time of only a few weeks.

We will progress much more rapidly now, however, because although the details are seemingly small for the commencing of a drilling campaign, the actual starting is of the most importance. A little time spent now in getting everything in proper shape for the drilling of wells will save days and even months sometimes during the progress of actual drilling.

The derrick, as you know, is now completed, and when you receive this letter the rig should have been on the ground for the drilling of our first well on the 6000-acre tract at Roanoke.

A man's word should be his bond.

I promised the good people of Roanoke I would be drilling this well by the 27th day of June, and although I hope to be well under way by that time, every one knows that when I make a declaration I

adhere to it, and they all know that this well will be drilling by the 27th of this month.

As soon as this well is drilling my plans are to start Well No. 2, and when it is drilling to commence the drilling of No. 3, and so on until I have completed the drilling of ten wells, and have production in the pipe lines—production that I positively guarantee to get.

Two Lees, as you will see in the booklet I sent you, were signers of the Declaration of Independence, our political independence that was obtained on July 4th, 1776. Financial independence is what I am striving to get for you, and by July 4th, 1922, we will be on our way toward this financial independence, riches, wealth and 'the pursuit of happiness.'

Now, Miss Kine, every one appreciates the merit of this proposition the same as you, and every one who knows about it is straining a point to purchase every interest he can possibly carry while these interests are still on the market at their present par value.

You know just as well as I do that the big money made in oil securities is made by buying interests at par, coming in on the ground floor the same as you did, and regardless of how many interests you now have reserved, I want you to write me today and let me hold just as many more for you as you think you can possibly carry.

I hope you will enjoy reading the booklet I sent you. I will appreciate hearing from you.

I hope you will enjoy reading the booklet I sent you. I will appreciate hearing from you.

Sincerely yours,

ROBERT A. LEE.

RAL:EL

P. S. I will try and answer your letters the same day I receive them as I have in the past, but a great deal of my time will be spent in the fields and your answers may be delayed for a day or two."

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

FIFTH COUNT.

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said defendants on July 24th, 1922, at Fort Worth aforesaid, in said division and district, so having devised the scheme and artifice and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter addressed to one Mrs. Violet R. Bowen, 1306 Wood St., Dallas, Texas, of the tenor following, to-wit:

'General Robert A. Lee.
Geologist.

Edwards Building

Fort Worth, Texas, July 24, 1922.

Mrs. Violet R. Bowen,
1306 Wood St.,
Dallas, Texas.

Dear Mrs. Bowen:

My final summons—my last call to you.

I have written you several times and have sent you circulars upon two different occasions trying to impress upon you the fact that General Lee Development Interests is the real oil deal of the hour, telling you the real importance of your making an investment in this wonderful proposition, no matter how small this investment might be.

It was with no little thought that I took upon myself this greatest of undertakings—the responsibility—that of the organization of the General Lee Development Interests when I promised you and every one of my friends and following that I would drill ten wells and positively guarantee without quim or quibble to get production.

After I had finished my plans and had outlined the procedure that I would undertake, I sat down and immediately wrote you and told you about it. I wanted to let you and all of my partners who were interested with me in the organization of General Lee Interests know of this before I gave the general public an opportunity to procure any of these interests.

\$250,000.00 is a small amount of money with which to drill ten oil wells, more especially so when the first one I am drilling will in all probability cost

\$50,000. But \$250,000.00, the amount of the capital of General Lee Development Interests is a lot of money when one is raising it solely through the mails, soliciting only checks in amounts from \$10.00 to \$100.00 each. Stop and consider one minute. Were I to take in \$1000.00 every working day, it would require better than 42 weeks to sell these interests,—almost a whole year.'

and such letter ending as follows:

'On June 27th I spudded in Well No. 1, on the immense 6000-acre tract at Roanoke and have already reached a depth of nearly 500 feet, and before many more weeks we should have one of the greatest producing wells ever brought in on this continent.

A \$10. bill ,a \$20. bill, or even \$100 is not going to break you. In fact, this amount of money will not even help to make me. But this small amount of money invested in General Lee Development Interests may be the means of affording some of the luxuries that this life affords and of which you and yours are entitled. It is not selfishness on my part. As a matter of fact, if I thought you were sending me one single dime under protest, if I thought that you bought one single interest and were not doing so of your own free will and accord, I would not think of accepting it for one minute and would return the money to you the day it was received.

Remember, these interests have only been on the market but a very few weeks and I have but a few remaining to sell. The time is now short in which you can come into this proposition at par and it now requires quick action on your part.

Don't delay another minute. This is positively the last chance you will ever have at buying General

Lee Development Interests unless you are willing to pay from five to ten for one for them.

Send in your remittance today, if even but for ten interests.

With my very kindest regards, I am,

Faithfull yours,

ROBERT A. LEE.'

RAL:LF

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

SIXTH COUNT.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Robert A. Lee, Charles A. Scherwin, Harry H. Schwarz, William Schloss, Philip Goldstein, otherwise called Ralph P. Gibson, Robert Ball Jr., Nathan H. Sang, otherwise called N. J. Lang, Max Hirsch, otherwise called M. Haas, and Walter Marks, defendants, continuously throughout the period of time from January 1st, 1922, to the date of the filing of the indictment at Fort Worth, in the County of Tarrant, State of Texas, in the division and district aforesaid, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit divers offenses against the United States Court, the divers offenses charged against said defendants in the divers counts of this indictment pre-

ceding this count, and made offenses by section 215 of the Penal Laws of the United States; and that said defendants did thereafter do divers acts to effect the object of said unlawful and felonious conspiracy, to-wit, not only the several acts of placing letters, circular letters, advertisements and publications in the postoffice of the United States at Fort Worth aforesaid, described in said several preceding counts, but numerous acts of preparing said letters, circular letters, advertisements and publications for mailing, and the newspaper and magazine advertisements and publications in said first count mentioned for publication and of making the false and fraudulent pretenses, representations and promises in the first count of this indictment described and obtaining by means thereof the money and property of persons belonging to the class of persons in said first count mentioned, as well as certain other overt acts now here specified; that is to say:

Overt Acts:

(1) The said defendants on March 11th, 1922, at Fort Worth, aforesaid, in said division and district deposited and caused to be deposited with the Western Union Telegraph Company a certain telegram to be transmitted by said Western Union Telegraph Company by means of its telegraph wires to Miss Alice M. Kane, 14 Warren St., Roxbury, Mass., which said telegram was of the following tenor and effect, to-wit:

(1) 'Fort Worth, Texas, Mar. 11, 1922.

Miss Alice M. Kane,
14 Warren St., Roxbury, Mass.

Askew and Kirby wells look like certain producers our lease almost sure to be worth many thousands per acre when these wells come roaring in have only

thirty eight interests left to sell will again be over-subscriber am reserving you five more interests until I hear from you you may take all or any part of them am keeping faith with you giving you every chance to share a big fortune with me you must decide at once advise.

GENERAL ROBERT A. LEE.'

(2) The said defendants on May 6th, 1922, wrote and caused to be written a certain letter at Fort Worth, Texas, in said division and district and addressed to Mr. C. F. Throm, 383 Nebraska Avenue, Toledo, Ohio, and enclosed said letter in a post-paid envelope and deposited and cause dto be deposited in the postoffice of the United States at Fort Worth aforesaid, and which said letter is in the following tenor and effect, to-wit:

'Mr. C. F. Throm,
383 Nebraska Ave.,
Toledo, Ohio.

Dear Mr. Throm: There is nothing that I would like better than to be able to call on you and have a nice, long talk and tell you of the developments of General Lee Interests No. 1 and General Lee Interests No. 2.

I would like to tell you about the Davidor well, which came in making ten million cubic feet of gas per day, and of the scores of other wells drilling near our leases, which make our holdings look so good.

I would like to tell you of my General Lee Development Interests, my latest and in all probability my last venture of this kind, for which I am going to drill ten wells and for which I am guaranteeing to get production.

To get away for a few days would mean that I would have to neglect my work here, and that would mean the retarding of our progress, so a personal visit is out of the question.

I want you to know all of the above and more, so I am sending my personal representative from Fort Worth. Ask him any questions that you want to know, I assure you it will be a pleasure for him to answer them for you. Any courtesies shown him will be greatly appreciated by me.

With very kind regards, I am,

Faithfully yours,

ROBERT A. LEE.'

RAL:H.

(3) That the said defendants on June 3rd, 1922, at Fort Worth aforesaid, in said division and district deposited and caused to be deposited with the Western Union Telegraph Company a certain telegram to be transmitted by said Western Union Telegraph Company by means of its telegraph wires to C. F. Throm, 383 Nebraska Ave., Toledo, O., which said telegram was of the following tenor and effect:

'Ft. Worth, Tex., 1922 Jun. 3 P M 2 17

C. F. Throm,

383 Nebraska Ave., Toledo, Ohio.

My personal representative Mr. N. J. Lang will call on you Monday with good news for you.

GENERAL ROBERT A. LEE.'

(4) That the said defendants on June 20th, 1922, at Fort Worth aforesaid, in said division and district, wrote and caused to be written a certain circular letter, and on said date caused the said circular letter together with a printed circular to be enclosed together in an envelope to be deposited in

the postoffice of the United States, at Fort Worth aforesaid, said circular letter being on the letter head of General Lee Development Interests, said letter commencing 'From General Robert A. Lee, Fort Worth, Texas,' and concluding 'Faithfully, Robert A. Lee.'

(5) The said defendants on July 11th, 1922, at Fort Worth aforesaid, in the said division and district, wrote and caused to be written a certain letter, and on said date aforesaid caused the said letter to be deposited in the postoffice of the United States at Fort Worth aforesaid, which said letter was in the following tenor and effect:

'July 11, 1922.

Mr. C. F. Throm,
401 Hunt St.,
Toledo, Ohio.

Dear Mr. Throm:

In answer to your good letter of the 3rd, I wish to state that I am sending my representative, Mr. Marks, to call on you, and I am sure that he will explain everything to your entire satisfaction.

If I were not so busy with the drilling of the well on the 6000-acre tract at Roanoke, I would like to make this trip myself, but hope you will appreciate that it is impossible for me to do this now.

With kindest regards, I am,
Faithfully yours,
ROBERT A. LEE.'

RAL:LF

(6) That in pursuance of said letters and telegram to C. F. Throm hereinabove mentioned the said defendants, Max Hirsch, otherwise called M. Haas and Philip Goldstein, called on the said C. F. Throm as representatives of the said General Rob-

ert A. Lee and the General Lee Development Interests and induced and persuaded the said C. F. Throm by making to him glowing and glittering promises as to the condition and possibilities of said company, to turn over to them large sums of money and property in payment for shares and certificates of interests in said company.

(7) That in pursuance of said letters and telegram hereinbefore mentioned the defendant, Nathan H. Sang, otherwise called N. J. Lang, called on C. F. Throm and induced and persuaded the said Throm to make further and larger investments in said company.

(8) That in pursuance to said letters and telegram hereinbefore mentioned the defendant Walter Marks called on the said C. F. Throm and by further statements and representations to the said Throm induced him to make further and larger purchases of said shares or certificates of interest in said company.

(9) That in pursuance to certain letters written by the defendants to Mrs. Emma O. Lewis, Lexington, Ky., the said Mrs. Lewis was advised that a personal representative of the said Robert A. Lee and General Lee Development Interests would call upon her and in pursuance thereof the said defendant William Schloss called on the said Mrs. Emma O. Lewis and showed her a letter of introduction from the said General Robert A. Lee; that the said Schloss represented that the company was in a very flourishing condition and would pay a 20 per cent dividend the first of September and five per cent per month thereafter, thereby inducing and persuading the said Mrs. Emma O. Lewis to make other and further investments in said company.

(10) That on September 29th, 1922, said defendant Robert Ball, Jr., called on the said Mrs. Emma O. Lewis and presented to her a letter of introduction from the said General Robert A. Lee, the said Robert Ball Jr., representing that he was a son-in-law of Colonel Humphries, an oil operator of Texas, and by making other and further statements concerning the prospects and possibilities of said General Lee Development Company the said Mrs. Emma O. Lewis was induced and persuaded to make other and further investments in said company.

(11) That in pursuance of said scheme the said defendant Ralph P. Gibson, called on the said Mrs. Emma O. Lewis and made other and further representations to her and induced and persuaded the said Mrs. Emma O. Lewis to turn over to said defendant Gibson large numbers of securities and property of the value of several thousand dollars, in exchange for shares or certificates of interest in said company.

(12) That the said Ralph P. Gibson called on Miss Alice M. Kane, Roxbury, Mass., and induced and persuaded her to turn over a large amount of securities of the value of several hundred dollars, in exchange for shares or certificates of interests in said company.

(13) That in pursuance of said scheme said defendants Max Hirsch, otherwise called M. Haas, and Ralph P. Gibson called on the Rev. William J. Vincent, New Orleans, La., and presented to the said Vincent a letter of introduction signed by General Robert A. Lee, and said defendants made representations and promises to said Vincent and induced and persuaded the said Vincent to make investments in said General Lee Development Interests.

Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

D. B. BURROUGHS,

Foreman of the Grand Jury.

HENRY ZWEIFEL,

United States Attorney.

H. L. ARTERBERRY,

Special Assistant U. S. Attorney.

S. R. RUSH,

Special Asst. to Attorney General."

The petitioners, with permission of the court, presented a plea in abatement and a plea of immunity, which was in writing, and as follows:

"Now comes the defendants Charles Sherwin and Harry H. Schwarz, and after having entered their plea of not guilty herein, and after their plea of immunity heretofore filed on the.....day of May, A. D. 1923, was by the court overruled, and with special permission of the court to so 'plead over' and present the same and the evidence thereon to the jury for a hearing and determination, present this their amended and amplified plea of immunity in bar of any prosecution by virtue of the indictment heretofore returned against them jointly on the.....day of April, 1923, wherein they are charged with the offense of violating Article 215 of the Criminal Code of the United States for the alleged offense of having placed letters, etc., in the United States mails for the purpose of executing a scheme and artifice to defraud as previously alleged, and for such plea would respectfully show the court:

"That they were connected as officers with certain oil companies known as General Lee Interests No. 1, General Lee Interests No. 2 and General Lee Development Interests, which were each common law

trusts, and that they were so connected with said companies as such officers prior to the convening of the grand jury which returned the indictment against them herein, and that prior to the convening of said grand jury as aforesaid, and prior to the filing against these defendants any complaint or charge, that one John F. Southworth, who at said time was either a member of the Federal Trade Commission, or one of its duly authorized agents, either or both, came to the offices of these defendants and demanded evidence concerning said oil companies above named, and of the participation by these defendants of the promotion of said companies; also demanded that each of these defendants answer his lawful inquiries with reference to said companies and these defendants connection therewith; and that these defendants had previously thereto refused to give any testimony with reference thereto to the said Southworth and to said Federal Trade Commission; and that upon the said Southworth's coming in person to the offices of these defendants as aforesaid, he demanded of these defendants that they produce all their documentary evidence showing how and in what manner said companies were organized and operated and demanded and required of these defendants by virtue of lawful authority vested in him, to answer certain questions then and there by said officer demanded of these defendants under the pains and penalties of violating the law and subjecting themselves to imprisonment and fine in case they refused to give said evidence and to produce said documentary proof and documents as hereinabove mentioned.

"That the first demand of the Federal Trade Commission was in the form of a letter, which said letter contained copy of a part of the law relating to the

giving of evidence before the Federal Trade Commission, and containing the penalty of non-compliance therewith, but did not contain any portion of the law relating to immunity, commanding that these defendants answer certain questions and furnish certain testimony in response thereto, and these defendants thereupon consulted their attorney, namely, R. F. Turner, Esq., and said attorney advised them that they did not have to furnish such information or give such testimony as was being demanded by the Federal Trade Commission, and relying upon said attorney's advice and his knowledge of the law, they then and thereafter refused to comply with such demand, or to in any manner furnish testimony of any character concerning their business, or letters and documents connected therewith. That thereafter the said John F. Southworth, authorized agent and examiner of the Federal Trade Commission appeared in person at their office and again demanded of these defendants that they produce their books, documents, contracts and letters of and concerning the affairs, conditions, operations, control and management of said oil companies herein mentioned, and these defendants again declined to furnish said information, or to give said testimony, stating to the said Southworth that their attorney had advised them not to do so; that thereupon the said Southworth requested the name and address of their said attorney, which was furnished to the said Southworth, and as these defendants believe, and so believing allege it to be a fact that the said Southworth left their offices and consulted with the said attorney for the purpose of convincing said attorney that it was the duty of these defendants to answer all questions and furnish all testimony demanded by the said Southworth, and that their failure so to do would make them liable to the punishment pre-

scribed in Article 8836-J; that the said Southworth did confer with the said Turner, and produced and read to the said Turner all of the law contained in Article 8836-A to 8836-K inclusive, and the said Southworth advised the said Turner that these defendants by the terms of said law were forced and compelled to give such testimony and that a failure to do so would make them subject to the punishment prescribed therein, and further advised the said Turner that the giving of such testimony on the part of Sherwin and Schwartz would not in any manner hurt or effect them in criminal prosecution, for that under the terms of said law the said Schwarz and Sherwin would not thereafter be subject to prosecution for any offense concerning which they were giving and were commanded to give such testimony, and that the terms of the law applicable to the Federal Trade Commission included common law trusts as well as corporations. That the said Turner, as attorney for these defendants, thereupon advised the said Sherwin and Schwarz that their oil companies came within the purview of said Articles 8836-I and 8836-J, and that their giving such testimony to the said Southworth would not hurt them, and that unless they did comply with the demands of the said Southworth they would be subject to fine and imprisonment, or both by virtue of their failure to do so, and then and there advised these defendants to furnish said testimony, documents and letters, and to answer such questions as were demanded by the said Federal Trade Commission through the said Southworth.

"That in obedience to the lawful demand of the said Federal Trade Commission, acting by and through the said John F. Southworth, either as a member thereof, or as an authorized agent thereof,

these defendants produced, exhibited and delivered to said officer said documentary evidence showing how and in what manner said oil companies were organized, and showing the connection of these defendants therewith, and of other persons therewith, and of the character and kind of business then being done, and the nature of said business and in fact all of the documents and records of said oil companies then in the possession of these defendants, and, in addition thereto, did orally testify before said officer and answer all of the questions then and there by him propounded, and fully complied in every way with the demands of said Federal Trade Commission acting by and through said office under the benefits, pains and penalties of the law.

"That thereafter, the grand jury of the Northern District of Texas, at Fort Worth, Texas, convened and the evidence given by these defendants to the said Federal Trade Commission was delivered over and produced before said Grand Jury which heard and considered the same in the investigation of the case then pending against these defendants, and upon said evidence, or at least a major part of it, the said Grand Jury found the bill of indictment against these defendants in this case.

"That because of the facts as hereinabove set out under authority of Article 8836-I of the United States Compiled Statutes of 1918, and Article 8836-J of said statutes, by virtue of these defendants having been required as hereinabove set out, to give testimony against themselves, and to introduce all of their documentary evidence showing their connection with the oil companies as above set out, all of which was used as evidence against them, and which was used for the purpose of criminating them, and each of them, these defendants each plead

their immunity to prosecution in this case, because of their having been required as aforesaid, to furnish to the said Federal Trade Commissioner their evidence both oral and documentary, as above mentioned, all of which is too numerous and voluminous to set out in this motion, but which these defendants each aver was required of them under such circumstances as that under the law they cannot be prosecuted about any transaction or matter or thing concerning which they each testified and produced as evidence, documentary or otherwise, before the Commission or agent thereof, as hereinabove set out.

"Wherefore, defendants and each of them pray that the issue of their immunity and evidence thereon be submitted to the jury for determination and that said plea be in all things sustained, and that they be dismissed further prosecution herein without further answer.

Charles Sherwin,
H. H. Schwarz."

The government filed a replication to this plea of immunity, which was as follows:

"Now comes the United States of America, by Henry Zweifel, United States Attorney for the Northern District of Texas, and for replication to the amended and amplified plea of immunity of the defendants Charles Sherwin and Harry H. Schwarz in the above entitled cause, respectfully alleges as follows:

"1. That neither of said defendants, either by compulsion under subpoena, or under oath, gave testimony or produced documentary evidence concerning any matters or things set forth in the indictment herein or in said plea alleged, and he therefore denies that said defendants, or either of them, obtained or are entitled to immunity from prosecu-

tion herein by reason of the production of any documents to or upon the demand of the Federal Trade Commission or any representatives as set forth in said plea, and he further denies that the said defendants, or either of them, were ever subpoenaed to testify or ever testified under oath, for or upon the demand of the Federal Trade Commission, or any other branch of the Government in connection with any matters or things or concerning any company or trust estate or concerning their own relations to any of the matters or things which are or may be involved in the charges laid against said defendant in the indictment herein.

"2. That the prosecution herein relates exclusively to an alleged violation of Section 215 of the Criminal Code of the United States and of Section 37 of the Criminal Code of the United States, and relates in nowise to any violation of the Federal Trade Commission Act, or to any other law of the United States except as above set forth.

"3. That neither of said defendants were at any time ever called before the grand jury which returned this indictment against said defendants, nor before any grand jury considering any violations of what is known as the Mail Fraud Statutes, nor did either of them at any time testify or produce documents before any such grand jury on that subject, except that the defendant Harry B. Schwarz voluntarily appeared and requested to go before said grand jury and to testify in his own behalf, and thereupon signed a waiver of immunity, which is in words and figures as follows, to-wit:

" 'Fort Worth, Texas,
March 31, 1923.

"I, H. H. Schwarz of Fort Worth, Texas, do hereby voluntarily request the United States Grand Jury,

sitting at Fort Worth, Texas, to permit me to appear before them in the matter now under consideration concerning Robert A. Lee, Charles Sherwin, H. H. Schwarz and associates, and concerning the General Lee Oil Interests, and request the foreman to administer the oath of a witness to me, acknowledging herein that I have been duly warned by H. L. Arterberry, Special Assistant United States Attorney of the United States of America, that I do not have to make a statement at all but that any statement I do make must be free and voluntary statement and that whatever statement I may make can be used against me in any proceeding in which I may become a party in any Court of the United States and connot be used for me or in my behalf.

"I again state that this is a free and voluntary statement and that it is at my own instance and request that I am now before the United States Grand Jury at Fort Worth, Texas, for the purpose of making a statement concerning the matters aforesaid which the said grand jury is now considering.

H. H. Schwarz."

"4. In behalf of the United States the United States Attorney denies that J. F. Southworth, the authorized agent and examiner of the Federal Trade Commission, advised R. F. Turner, Esq., attorney for said defendants, that the failure of the defendants to answer questions propounded by him, and to furnish testimony demanded by him, said Southworth, and to furnish documentary evidence at his request and demand would subject the said defendants to the punishment prescribed by the said Federal Trade Commission Act, and denies that the said Southworth advised the said Turner that the giving of such testimony and the answering of said questions and the furnishing of said documents would

secure for the said defendants immunity from any criminal prosecutions, as alleged in said Amended and Amplified plea.

"5. Said United States Attorney further says that the alleged evidence and information, both documentary and otherwise, alleged to have been given to the said J. F. Southworth, as a representative of the Federal Trade Commission, if any such evidence was given, was entirely independent and apart from the evidence upon which said defendants were indicted herein; that none of the alleged information or evidence documentary or otherwise, alleged to have been given and furnished to the said defendants or either of them, was presented to the grand jury, or was in anywise used against said defendants in the representation of this cause before the grand jury, or in the securing of said indictment; that none of said information or evidence, documentary or otherwise was in the possession of the Government Attorneys or agents of the Government or postoffice inspectors connected with the present proceedings, nor did any of said persons have any knowledge of the said alleged proceedings before the Federal Trade Commission or its representatives until the filing of the defendant's original plea of immunity herein, nor has any of said alleged information and evidence, documentary or otherwise, been used against said defendants in this or any other proceeding.

"6. The said United States Attorney further says that, at the time of the alleged giving and furnishing of the information and evidence, documentary or otherwise by the said defendants, it is nowhere shown in said plea or in the record or in any other manner that the defendants or either of them at any time, refused to furnish said information or evi-

dence on the ground that it might tend to incriminate him, or that said defendants, or either of them at any time prior to the filing of their original plea of immunity, made any claim of immunity in connection with the matters aforesaid, or any of them.

"Wherefore plaintiff prays judgment of the Court.

Henry Zweifel,

United States Attorney for the Northern
District of Texas."

Upon said plea and the replication, the following hearing was had before the Court:

Charles Sherwin, one of the petitioners, testified before the court as follows:

"I am one of the defendants in this case. I am and was connected with the common law trust companies known as General Lee No. 1, General Lee No. 2, and General Lee Development Interests. Robert A. Lee, H. H. Schwarz and myself organized these three concerns, and I have been a trustee in these three companies since their organization up to the present time.

"I received a written communication from the Federal Trade Commission at Washington, D. C. I have not been able to locate all of these communications at this time. The document you hand me dated June 30, 1923, I received from and through the United States mail and I read the same. (The defendant then offered in evidence letter dated June 30, 1923, and marked Exhibit 1, which was admitted by the court, and is as follows: 'Washington, June 30, 1923. General Lee Development Interests, Edwards Building, Fort Worth, Texas. Sirs: This commission officially requests under Sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information

called for by the annexed schedule. As to any portion thereof which you cannot answer immediately please supplement your first statement with seven days upon the receipt of this letter. The Commission will consider this application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this commission's lawful inquiry.'

"This commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of filing the information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary.'

"I received the two writings that you now hand me, and I read them over, both of them (referring to Exhibits 2 and 3) I did not make any reply to the letters or either of them at the time I received them. Later on I met a gentleman by the name of Mr. Southworth; he called on me at our office—that is, the office of the General Lee Development Interests. Mr. Schwarz and myself were present and we had a conversation with Southworth. He reported himself to be an agent of the Federal Trade Commission. He sent a card in with his name on it—John F. Southworth, Federal Trade Commission. At that time he did not show us any other evidence

of what he represented, but later on we saw that he carried a portfolio with letter heads and other documents with the Federal Trade Commission form, and from the time we first met him up until the present time, I believed and still believe him to be the official of the Federal Trade Commission. When he called upon us and made himself and his official position known, he wanted to know why we had not answered the questionnaires sent us from Washington. I told him we did not come under the jurisdiction of the Federal Trade Commission, because we were not a corporation. Southworth then said we did come under the jurisdiction of the Federal Trade Commission, and that by not answering the questionnaires sent to us we were committing a crime subject to a penalty of imprisonment and fine, either or both. I told him I had consulted my attorney Mr. Turner at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we fill out or file any questionnaire sent to me by the Federal Trade Commission. Mr. Southworth then asked for the address of my attorney, and I gave it to him. He again told me we were committing a crime, and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. Southworth had an appointment with Mr. Turner and they met in our office and read the law to Mr. Turner, Mr. Schwarz and myself after which Mr. Turner then advised me that in accordance with that law, we were committing a crime by not answering the question.

Question:

"Now then, what did you do?

Answer:

"We gave him everything that he demanded. The declaration of trust, copies of contracts, copies of leases, showed him record of our books gave him a list of the stockholders and some correspondence we had on some of them. We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him; in fact we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, and partly on forms filled in. He got the names of our stockholders from our stock ledger. The stock ledger was furnished him by Mr. Schwarz. We were both present all the time, and acted together in furnishing Southworth this information.

"This gentlemen (Mr. Southworth) came to our office a half a dozen times before we gave him any information. After we began furnishing him with documentary evidence and information, he came to our office about twenty times.

"When he left our office and this city, he left with these documents in his possession. After Southworth left the city, we received communications from him by telegram. The four documents you now hand me, are the two telegrams received from Southworth by us and my two replies thereto, and they are marked exhibits 4, 5, 6 and 7 (the exhibits were offered and admitted in evidence, and are as follows:

"No. 4. 'October 27, Eldorado, Arkansas, Charles

Sherwin care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, are not received. Southworth.'

"No. 5. 'Fort Worth, Texas, October 27, 1922. John F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz.'

"No. 6. 'November 8th, Kansas City, Missouri. General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth.'

"No. 7. 'November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin.'

"At the time that the first telegram was received I was not in Fort Worth, but upon my return, Schwarz and I had a letter from the Federal Trade Commission by John F. Southworth, examiner, asking for these names to which the telegram referred. In obedience to the letter and telegram we wrote a list of the principal stockholders of the General Lee Interests, being names and addresses of these stockholders demanded at that time, and sent them to John F. Southworth, Kansas City, as requested. We furnished the names and addresses of these stockholders to Southworth. After that we received another communication from Southworth asking for another copy of our declaration of trust, which Mr. Southworth claimed he had misplaced. We made and mailed same to him at Washington.

"Before we surrendered any information, documents or evidence to Mr. Southworth, there were discussions in our presence between him and our attorney about the law applying to our common law trust, and Mr. Southworth brought a book with him in which it elaborated as to whether or not a common law trust came under the jurisdiction of the Federal Trade Commission, and the fact that it was only supposed to cover corporations—that is, he brought a pamphlet covering common law associations.

"I do not recall whether he claimed that was a decision by one of the courts or a ruling of the Department, but my attorney then told me that I was subject to the penalty as the law stated, if I did not surrender.

"I never did make at any time, or intend to make any statement that I had waived any rights which the laws of the land gave me. There was no discussion of the question of immunity between me and Southworth, or between me and anyone else. The three (3) declinations of trust were offered by defendants and admitted by the court without objection, the same being declaration of trust of the General Lee Interests No. One, General Lee Interests No. 2 and General Lee Development Interests, which said declarations of trust in the order named are as follows:"

Which declarations of trust are fully set out in the record, and it is not necessary to make same a part of this petition.

Contract dated the 12th day of April, 1922, between the General Lee Development Interests and petitioners was identified as an exhibit, and introduced in evidence, which is fully set out in the record, and which

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it is not necessary to make a part of this petition.

The witness Charles Sherwin continued to testify as follows:

"The three declarations of trust just introduced were recorded in the records of deeds, Tarrant County, Texas. Our list of stockholders was kept in our stock ledger. No one had a list of our stockholders save and except us and our companies, and no one had a copy of the contract between Mr. Schwarz and myself (Sherwin) on the one hand, and Mr. Lee upon the other. That document was not recorded. He (Southworth) inquired into the date of incorporation, and we answered every question and he put down the answers to each and every question on the questionnaire. I am certain we answered every question and I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. Our answers were made truthfully—they spoke the truth. We furnished him (Southworth) a true list of the stockholders that he demanded, and their addresses. I gave him information concerning the plan of operation of the three companies, and made out separate questionnaires for each company, that is, the General Lee Interests, General Lee Interests No. Two and the General Lee Development Interests, of which Mr. Schwarz and myself (Sherwin) were trustees."

On CROSS EXAMINATION, the witness Sherwin testified:

"My reply to the questionnaire was not sworn to. None of my replies were sworn to, and I never testified under oath as to any of these facts. There was a hearing held just before Mr. Southworth—I mean by hearing before him (Southworth) his visit and talk to us. There was a reg-

ular hearing. I know this because questions were made and answered at our office.

"Our evidence was not taken down by a stenographer. We were not just talking to Mr. Southworth and having a conversation with him about these things, we were answering questions that were put to us. Records were made of the answers given right then by Mr. Southworth, and Mr. Schwarz and myself. These records have been returned to the Federal Trades Commission. I have no private memorandum of it. It was answered in that questionnaire, that is what I mean. When we started to answer his (Southworth's) questions, we did not decline to answer any of them upon the ground that they might tend to incriminate us, but we refused to answer any question before he made his appearance, and after his first appearance at our office, we refused to answer the questionnaire that was mailed to us, and ignored it. The declaration of trust were on file here in Tarrant County at the time we furnished copies to the Federal Trade Commission. The information we furnished Southworth outside of the declarations of trust, were contracts—every contract we had in the office, drilling contracts and contracts for leases and contract with General Lee. No other person had copies of those contracts, except the drilling contractors who had copies. I do not believe the parties from whom we secured the lease had copies. I have searched my memory and I would have no way of telling at this time whether the other parties with whom these leases were made had copies. The leases were recorded. In addition to this, I gave Southworth the addresses of the largest stockholders we had at that time. We let him make notes from correspondence which he wanted to read, and this

correspondence related to the purchase of interests by some of our stockholders who had already purchased stock. In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed him (Southworth) other letters in which complaints were made that had not been adjusted. He specifically called for those letters. He must have known that there were complaints from the stockholders in our files, because he asked for letters on them. He did not mention the name of the stockholders who had specifically complained, but he wanted letters containing complaints if any we had at that time. My attorney was not present at this time, and I had not previously consulted him with reference to this question. I had consulted him with reference to whether or not we would answer the questionnaires. With respect to the questionnaires, I answered that we gave him (Southworth) the name of our company and the date of its formation and incorporation, and those facts were already a public record. The other questions related to the state of incorporation, the statutory office, principal business office; the fourth question relates to the place of business, and that was shown in the declaration of trust. I do not have a copy of our reply to this questionnaire at this time. I have been looking for all of those records but we have moved several times and I have not been able to find it. I have been looking for a copy of these answers but I do not remember whether we kept one or not. I have not yet found our replies to the questionnaires.

"In answer to the sixth question, we answered,

that our company was authorized to do business in no State other than Texas.

"To the seventh question we answered, that our company was not authorized to sell stock or securities in any State other than Texas.

"The eighth question stated the amount of our preferred and common stock authorized to be \$250,000.00 of the par value of \$1.00. This was also shown by the declaration of trust.

"The ninth question showed the amount of preferred and common stock issued.

"The tenth question and answer showed the amount of preferred and common stock the companies intended to issue. This was shown in our declaration of trust also.

"The answer to the eleventh question shows the promoters and organizers, to be Robert A. Lee, H. H. Schwarz and Charles Sherwin. This was shown by the declaration of trust.

"The answer to question twelve, advised him (Southworth) and the Federal Trades Commission of the previous business connections of the promoters and organizers, and I gave them a brief description of what business we (the organizers and promoters) had been in before. I believe we covered the period of six or seven years in giving this information, and this information showed that we had been engaged in legitimate business.

"The answer to the thirteenth question stated that no compensation or profit was received by the promoters and organizers.

"The fourteenth question was: 'Annex copies of all promoters agreements and proposals.' Our

reply thereto was, we furnished him the contracts for the drilling of the wells, and the contract for the acreage, and the contract with Robert A. Lee. The Robert A. Lee contract covered the entire organization, and how it was to be operated and carried on. Briefly it provided for the drilling of ten wells; for the exchange of capital stock in the General Lee Development Interests, and the form in which we were to sell these interests. This is the contract with reference to the third company, that is, the company known as the General Lee Development Interests.

"The contract provided for compensation to General Robert A. Lee, and in which contract it was stated that the compensation of Robert A. Lee was to be Fifty (\$50.00) Dollars per month, and ten per cent (10%) of any production obtained. The ten wells were to be drilled or acquired, and we gave them this information. At the same time, in response to their demand, we gave them (Southworth) other literature—Yes, all literature we had issued, prospectuses, letters, booklets, etc. Some of these things were such that we had kept hidden. I can specifically state what ones—some particular form letters that we had. Copies of these had been sent out to purchasers of interests. Not a very great number of purchasers, probably several hundred. They were not published anywhere in newspapers or places like that.

"In reply to the fifteenth question, we gave them the information as to how much stock was issued on the organization of the company, the same being \$250,000.00, the total amount of the capital. We told them, (Southworth) that the stock was issued to Lee, Schwarz and Sherwin, for the

consideration of the contracts, which was in pursuance of the agreement with R. A. Lee.

"The seventeenth question, asking the amount of stock issued to promoters, organizers, etc., was covered in the contracts already given to him.

"The eighteenth question asking for appraisal value of any item mentioned in question seventeen, was answered by our stating that this was answered in the contracts.

"To the nineteenth question we answered—That no bonds, debentures and secured obligations have been issued.

"To the twentieth question, we answered—That no bonds, debentures and secured obligations were proposed to be purchased by the company.

"To question twenty-one, we answered—that our companies were not the result of any consolidation, merger or reorganization.

"To question twenty-two, we answered—that no subsidiary are controlled by stock ownership or otherwise by us.

"Question twenty-three asked for the name and address of each officer, director, promoter and organizer who has been or is now connected with, or interested in the company, with their experience and qualifications for present positions. That was answered: R. A. Lee, Fort Worth; Harry H. Schwarz, Fort Worth; and Charles Sherwin, Fort Worth, Texas. I do not believe anything was said in this answer about our qualifications and experience, as I believe it had been answered before that. I believe there was a question previous to that (23), which asked

us to give him the previous business experience of the trustees, and I do not recall just how that question was answered, but we gave him a list of legitimate employment.

"In answer to question twenty-four which asked for the names and addresses of the seven largest stockholders; the number of shares held by or issued to each, the consideration paid by them respectively, we gave the names and addresses, and the amounts owned, and the consideration, which was par value. I do not recall the names given, but they were legitimate names and addresses.

"We answered in reply to question twenty-five, that no stock had been donated to the treasury.

"Questions 26 to 29, inclusive, were under the head of business. No. 26 asked us to describe briefly, the business purposes and object of the company; where it was to be conducted, the facilities and plant available therefor, and I do not recall exactly how that question was answered, but I know we answered it. That the purpose was to drill ten wells, and I believe we stated substantially the purpose of the business as was set out in the declaration of trust. I believe we stated the office to be at Fort Worth, with one well now drilling, and gave the depth of that well. I do not recollect the answer with respect to the facilities of the plant, but I believe we covered every question pretty thoroughly.

"Question 27 was: 'When did the company commence business, the amount of capital stock paid up at the commencement of business?' And we answered: 'April 12th, 1922, as the date when the declaration of trust was either filed or executed,

and as the commencement of business, and that there was no capital stock paid up at the commencement of the business.

"The answer to question 27 answered question 28.

"In answer to question 29, we stated that the company has not taken over any existing business.

"Question 30 was as follows: 'What is the company's immediate plan of action?' What amount of money will be necessary to accomplish it; how is it proposed to raise this money; what stock or securities are to be sold therefor, or have been sold, and on what basis?" And we answered that the company's immediate plan of action was to complete a well then drilling, and drill additional wells as fast as possible until the contract calling for ten wells had been complied with, substantially the same as proposed in the declaration of trust, and all the literature sent out. I do not believe I stated the amount of money this plan would necessitate at that time. We stated that we proposed to raise the money from the sale of the interests (Stock). We further answered that the stock or securities to be sold and have been sold were stocks belonging to the trustees, that is, the capital stock, the full amount, and on the basis of par value.

"Question 31 is as follows: 'Does the company sell or propose to sell its stock direct, or through others—state who?' And I answered that the company was not selling its own stock, but was selling stock that belonged to the trustees, the company had no stock for sale, and I do not believe that I particularly answered whether the

stock was to be sold through others or direct, although I did go into the method of disposing of the stock in some question or in some explanation.

"Question 32 required us to give the names and addresses of all stock or securities agents or representatives now in the field, and that is where I answered the question that we had some Chicago brokerage house handling some of the stock for us, and I believe I gave the name of Leslie Vincent & Company.

"Question No. 33 required us to state how much has been paid to date as commission, bonuses or salaries to stock salesmen, and I believe I answered by saying—none by the company. Leslie Vincent & Company did not make sales to a number of purchasers of stock under their own name. In most instances to the best of my recollection and knowledge, they did not use their own name. They were under no instructions with respect to this whatever. I did not see any correspondence that was sent out, or letterheads of the Leslie Vincent Company in connection with the sale of stock in the General Lee Companies. They had letterheads and wrote to us on their own letterheads. I do not know whether they had business cards or not.

"Question 34 is: 'How much has been spent to date for advertising in connection with the sale of stock?' and I believe I answered that none had been spent by the company. The questions in the questionnaires were the same in each instance, that is, with respect to each of three companies, and the answers thereto were substantially the same. In the instances concerning the amount

spent to date for advertising in connection with the sale of stock, our answer was—none in each instance. I would sometimes vary in stating the amount of the capital stock and price, but as to those general questions, the answers were practically the same.

"Question 35 is: 'State the compensation, commission or bonuses paid to stock salesmen, the discount and profit to each,' to which I answered —none by the company.

"Question 36 is: 'Has stock been sold or apportioned enblock to any promoter, broker, or fiscal agent?' This question was answered by stating that the company had not accepted any notes in payment for stock sold to promoters, brokers or fiscal agents.

"Question 38 is: 'At what price are company stock or securities to be sold?' And I don't recall just how I answered that. I don't know whether I stated that it was to be sold at the option of the trustees or whether I said par value.

"Question 39 is: 'What percentage of the gross proceeds thereof are to be paid by the company?' And I answered—none.

"Question 40 is: 'Have the stocks or securities which company proposes to sell, been underwritten, and on what basis, or is company assured that all of the funds needed will be obtained?' And I believe I answered that by saying—this stock was traded for the leases and contracts, but I do not recall how I stated the company was assured that all of the funds needed would be obtained, but I believe I did give some answer to that question.

"Question 41 is: 'To what extent are subscriptions to be made, conditional on obtaining total subscriptions or a given amount, and to what amount?' And I believe I answered 'To no extent.'

"Question 42 is: 'Annex copies of all literature, advertisements, prospectuses and circulars used in the furtherance of the sale of stock and securities by company or others and any instructions to stock salesmen?' I have previously answered that—I gave them literature and form letters. The literature was being used in campaign for the sale of stock, and advertisements were in oil papers or daily papers, and the prospectuses were sent to persons solicited for the purchase of stock, but there are some letters that were not—they were sent out to all stockholders, and were letters that we would in every case send to some stockholder, that is, in every case where that form seemed to be appropriate for the exigency that had developed.

"Question 43 is: 'Describe accurately but briefly the properties acquired, real and personal, with all improvements or plants now on or to be placed thereon; the amount paid or to be paid in money, stock, bonds, securities or otherwise thereof, and the actual value of each portion or parcel thereof?' I answered that by giving copies or each individual lease that we had at that time assigned to the General Lee Development Interests, which leases were recorded in some public office. I told them of the physical properties, drilling well; the structure, and in addition to telling them, I took Mr. Southworth up to see the properties. As to the amount paid, I believe I just gave what I

considered the potential values under certain considerations and certain conditions.

"Question 44 is: 'Give similar description of property or properties which the company has contracted to acquire or intends to acquire?' And I answered by stating that was some conditional leases, and I gave them copies of them.

"Question 45, with respect to financial conditions is: 'Annex trial balance, last balance sheet, or balance sheet prepared for the purpose of this report; profit and loss accounts?' And I answered by giving this. The bookkeeper took care of that for us. I filed an income report for the General Lee Development Interests, but not on the other two.

"Question 46 is: 'As to the assets enumerated therein, describe briefly each item, state the actual cost, or present actual value thereof, with appraisal by disinterested appraisers?' And I believe we answered by saying—'We had no appraisal made.'

"Question 47 is: 'If the company is mining or oil company, furnish full report of its properties, acreage or leases?' Our answer to this—I just gave them what we had previously given them.

"Question 48 is: 'Give the gross income from operations or production during the preceding twelve months?' And I answered, 'None.'

"Question 49 is: 'State any existing facts or probable development concerning your company, its officers, directors, managers, promoters, or representatives; properties, business or prospects, which have not been covered by preceding questions, but which should be known to an investor?'

And I do not recall just what information we gave on that particular question, as we had been giving all of the facts as we went along.

"Question 50 is: 'Do you offer to accept, exchange or dispose of thrift stamps, war-savings stamps or liberty bonds in order to sell your securities or stock?' And I answered 'No.'

"Question 51 is: 'If you answer to question 50 or any part thereof, 'yes,' will you voluntarily cease and desist from such practice in the future?' And that was answered by the preceding answer.

"I did not at any time, particularly at any place in my written responses to this questionnaire, refuse to give any information called for in the questionnaire, on the ground that it would tend to incriminate me, nor to any question asked me by the representative of the Federal Trade Commission, and neither did either of the trustees in my presence. The information I gave, was as far as my information went, or what I considered legitimate. I gave information to a representative of the Federal Trade Commission outside of the information in this question. Mr. Southworth wanted to know more about the plans after reading the contract with General Lee; he wanted to see the correspondence. I showed him the correspondence, both good correspondence and that I considered such, and the complaints—adjusted complaints and complaints that have not been adjusted. I did answer all questions that were demanded. There was so much information given at that time I do not recall any particular information given. It was with respect to the general workings of our business organization and every-

thing in connection with it. There was never any order made by the Federal Trade Commission that was brought to my knowledge with respect to my business, nor did they make any order against us. There was no other formal hearing at which we appeared, which was presided over by any member of the Federal Trade Commission or anybody connected with it, other than by Mr. Southworth. The same man (Southworth) appeared in our office numerous times in the same capacity, and I suppose there would be just as much dignity and importance to one visit as there would be to a number. It was the same man each time, and acting in the same capacity.

"The Postoffice Inspector Swinson visited our office. We had a number of rooms—one suite of rooms in which all of the three companies were officed. Mr. Swinson first visited us last August. The visits of Mr. Southworth had ceased, I believe, just a short time previous to Swinson's first visit. I imagine something like a week or two. I knew what the official capacity of Mr. Swinson was. He talked to me about the business in question and its operations, and requested that I give him information. He did not make any threat of any kind. I talked freely to him, as he seemed to have about as much information as I had at that time. I told Mr. Swinson on that first visit and all other occasions thereafter, substantially the same as I had told Mr. Southworth—practically the same, not quite as much detail. I do not believe the question ever came up between Swinson and myself as to whether I had been talking to Mr. Southworth."

On RE DIRECT EXAMINATION, Mr. Sherwin further testified:

"We had a contract, Lee, Schwarz and myself with these concerns (meaning the three companies) that we were to dig the well and furnish the money therefor, and the stockholders were to get the acreage and the wells and the production, and what was left over from the sale of stock, after the completion of the wells, was to be our profit. The leases and wells were to go to the stockholders. If there was anything left of the \$250,000.00 worth of stock after these wells were drilled, it was to belong to us. That was one of the contracts we turned over and explained to Mr. Southworth. The contracts between ourselves and the driller were not recorded. We furnished these documents to Mr. Southworth. The leases in most instances as recorded, showed the consideration to be one dollar (\$1.00) and other valuable consideration, and in some instances maybe ten dollars (\$10.00). The real consideration for these leases I explained to Mr. Southworth.

"I took Mr. Southworth out and showed him our holdings at that time, and explained just how it was. He wanted to know exactly how we expected to make any money, and I explained to him that in all further wells being drilled or to be drilled we expected to own offset acreage, and did not expect to drill any more wildcats. This first well we were drilling was a wild cat. That was in Denton County, near Roanoke. We had 6163 acres in leases or land surrounding the well, and we explained to Mr. Southworth.

"When Mr. Swinson came to our office he did not state where he got his information, and I stated a moment ago, that he seemed to be familiar

with the transactions, and I got that from his conversation. He did not state where he got his information, but he did not get it from me; but I did give him certain additional information as he wanted and requested. I knew he was an official inspector under the United States Government'.

On RE CROSS EXAMINATION, the witness Sherwin further testified:

"Mr. Mendenhall called at the office of our company, Mr. Swinson brought him and introduced him. I knew he was connected with the Government. He made no demand or threat. I let him examine the books. Inspector Dawkins called upon me previous to Inspector Swinson. I gave him some information about the business operation of the company. I do not recall just what we gave Mr. Dawkins. I do not think we gave him anything the first time he called. We asked him to send us a questionnaire, which he did, and I answered it. I knew he was a postoffice inspector. He did not make any demand or threat. All of these gentlemen (Postoffice Inspectors) came after I had been convinced by Mr. Southworth that I would have to give up this information. I had not been convinced by Mr. Southworth that I would have to give up this information to anybody that came along, but I had been convinced that I would have to give it up to the Federal Trade Commission. I assumed that the Postoffice Inspectors had nothing to do with the Federal Trade Commission, and in giving the Postoffice Inspectors the information I was not acting under compulsion that had been exerted upon me because of the conversation previously had with Mr. Southworth. I gave it under the advice of coun-

sel. The information I gave to the Postoffice Inspector Dawkins, was—the questionnaires was answered—both Mr. Schwarz and I answered it. I was present. I can tell you some of the things they wanted to know. To the best of my recollection, it practically covered the same questions that were asked in the questionnaires of the Federal Trade Commission. I told them practically the same things as I told the Federal Trade Commission, with the exception of not giving them any contracts. I do not recall whether they asked for any contracts in the questionnaire or not. I do not believe I declined to give any information they asked of me, and if my memory serves me right, if they did ask for contracts I gave them to them. I do not believe I showed them (Postoffice Inspectors) any of our private correspondence. I did not give them or show them a list of our stockholders at that time, that is, in reference to the correspondence with Mr. Dawkins. I made other statements in the postoffice building, and Mr. Swinson called at the office several times, and I was present sometimes and sometimes Mr. Schwarz and I were both present, and they asked for additional information, and in response to questions asked by them upon this occasion, we did give them a list of the stockholders, or tell them who the stockholders were. They asked to see some correspondence, and I believe Mr. Schwarz exhibited some to Mr. Swinson in response to a particular demand, I believe in reference to Mr. Throm, one of our stockholders. They asked for correspondence had between Throm and us, and we gave it. I am sure we showed him some of it. There was no other reason why it was not shown to him, other than the fact that it was mislaid at that time."

On EXAMINATION BY THE COURT, Witness Sherwin further testified:

"Question by the Court: 'Now, going back to the time when your attorney was present, how much of the law relating to the powers of the Federal Trade Commission was read to you or in your presence on that occasion, or on those occasions that you have referred to?'

"Answer: 'As I recall it, the entire article pertaining to the penalty for refusing to comply with the demand, and also the question as to whether or not the common law trust came under the jurisdiction of the Federal Trade Commission, was read to me.'

"Question by the Court: 'Was this particular section read to you, which recites to you that the Commission shall have power to require by subpoena, attendance of witnesses, and produce such documentary evidence relating to any matter under investigation—was that read to you?'

"Answer: 'Yes sir, I believe the Commission issues a booklet that the examiner had with him, showing that part—yes, that was read to me.'

"Question by the Court: 'Was this also read to you, that no person shall be excused from attending and testifying or from producing documentary evidence before the Commission, or in obedience to a subpoena of the Commission, on the grounds or for the reason that the testimony or evidence, documentary or otherwise, might tend to incriminate him, or subject him to a penalty or forfeiture—was that read to you?'

"Answer: 'Yes sir.'

"Question by the Court: 'Was this also read

to you, that no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, before the Commission, etc.—was that read to you?"

"Answer: 'No sir, I do not recall having heard it. I did not read the booklet. I know what it contained because it was read to me. This portion was not read to me. No sir. Mr. Southworth did the reading of it, my attorney was not present at the time Mr. Southworth read it to me, and I did not say awhile ago that it was read in the presence of myself and attorney. When my attorney came, nothing was done other than he told me that I would have to answer those questions. That is all that took place when he was there.'

"Question by the Court: 'Was this portion read to you—that any person who shall neglect or refuse to attend and testify to or answer any lawful inquiry, or to produce documentary evidence if it is in his power so to do, in obedience to subpoena, or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof, shall be fined, etc.—was that read to you?"

"Answer: 'Yes sir.'

"Question by the Court: 'Was this read to you—No natural person so testifying shall be exempt from prosecution and perjury in so testifying, etc.?"

"Answer: 'No sir.'"

On RE DIRECT EXAMINATION the Witness Sherwin further testified:

"I had the advice of counsel with respect to answering questions of the postoffice inspector. I advised with several attorneys, I believe it was in November, but after I had given information to Mr. Dawkins. I answered one questionnaire to Mr. Dawkins. My attorney advised me to give these Inspectors everything they wanted, and did not suggest whether it would be a matter of policy or duty. I came to the conclusion that it was a matter of duty to give it to them."

It was agreed that the record should recite that the petitioner H. H. Schwarz would testify substantially to the same facts as petitioner Charles Sherwin.

J. S. SWINSON, called by the Government, testified as follows:

"I am a Postoffice Inspector, and I had charge of the investigation of the three General Lee Companies. I directed other Inspectors who were engaged in that investigation. Prior to my reading the motion I did not know that there had been any investigation of those three companies or the defendants in this General Lee indictment by the Federal Trade Commission. I learned this three days ago, when I read the motion in the United States Attorney's office. I did not get any information from the Federal Trade Commission or any of its representatives with respect to the defendants or their companies, and no complaints came from the Trade Commission against these defendants—they came from individuals. I got some letters, circulars and prospectuses from the company—a great many. I did not get anything like a full list of the stockholders. I did

get a few names and addresses. I got a statement from the defendant Sherwin. He said he consulted an attorney before signing it. He took it away with him and brought it back signed.

"I know John F. Southworth. I met him last fall. I did not talk to him about the General Lee matters. As near as I can get at it, his business is to procure information for the Federal Trades Commission of the United States Government. I think his title is Special Examiner, Federal Trade Commission. Sherwin and Schwarz both gave me information. I got information and a statement from each one, that is, Sherwin and Schwarz and General Lee showing and concerning operation of these three companies; that they were promoting it; the amount of money collected and how the operations were being conducted. We discussed two or three names of stockholders that we had complaints from. I called their attention to these complaints and told them the parties had been complaining and their names. I asked for correspondence between them and complainants, particularly a telegram sent to an agent who had sold stock to Throm. Schwarz reported that he could not find it. I afterwards asked them that I might be permitted to see the whole Throm file, but that was declined. I think that was the first of this year. This was the first declination I got from either of them. I believe it was evidence I specifically asked for. The reason they said they wanted to see their attorney before signing the questionnaires, and what gave rise to that, was, we had talked about the operations generally; how much money that they had collected; what they had done; how many stockholders they had, and complaints received. We took notes, and the

statement was dictated to a stenographer by myself in their presence, and that was read—each one took the statement and said he would like to consult his attorney before signing it. Each one carried the statement away, and later returned with it signed by each one. That was the only time the matter was mentioned or came up between us, and they simply said it was best not to sign any statement at all until after consulting an attorney. That it was true that they had no objection to signing it, but it was best to see their attorney. When I first approached these defendants I told them who I was, and what my business was, and that they were not obliged to answer any questions unless they wished to; that we would like to have the facts and find out about the business, and see if the complaints made were justified, and each one of them said they would be perfectly willing to give any information and answer any questions, and I told them further that the information that they might give might be used against them, that there was a chance for that, although I did not know what might be done.

"I never heard of the Federal Trade Commission's investigation from them or anyone, until I read this concern. The first time I ever heard anything about the Federal Trade Commission investigating them, and we never got any information, documents or letters of any kind or description, and I never had any conversation with Mr. Southworth or any other agent of the Federal Trade Commission regarding these people that I recollect. Mr. Southworth was investigating another case. I saw him two or three times. I had charge of the investigation of this particular case, and assisted in presenting it to the grand jury.

I had and presented to the grand jury, evidence obtained from these defendants in the manner and at the time heretofore indicated, including the statements signed by them. I think I read part of the statements to the grand jury."

H. L. ARTERBERRY, called by the Government, testified as follows:

"I am Special Assistant United States Attorney, and as such presented the case to the Grand Jury that resulted in the indictment now under consideration. At that time I did not know anything about the investigation of the defendants or their companies by the Federal Trade Commission. I never heard that until the filing of their motion in the case. Nothing developed in the grand jury proceedings that would show or indicate such, and I never heard of it. Mr. Schwarz was the only defendant who appeared." Tr. 128.

It was agreed by attorneys for Petitioners and the Government:

That the Government's exhibits one, two, and three, the same being the declarations of trust of the General Lee Interest No. One, General Lee Interest No. Two, and the General Lee Development Interests (which are fully copied in the record) were introduced by the Government in the trial of this case on its merits; that identical copies of each of these documents are the same ones which the defendants Sherwin Schwarz testified that they gave to John F. Southworth, Agent of the Federal Trade Commission. That the Government's Exhibit No., the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson, as second parties, of date April 12, 1922, and the same containing a copy of the agreement by

and between R. A. Lee, and Sherwin and Schwarz, concerning the compensation of said Robert A. Lee for his services in said company (a copy of which contract is set out in the record) is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and this last mentioned exhibit was introduced by the Government in the trial of this case on its merits. (Page ——)

After hearing the plea of immunity as set forth above, and the evidence thereon as herein set forth, the trial court overruled and denied the same, to which the petitioners excepted, and preserved their exception by assignment of error. (Tr.)

Thereafter a trial was had upon the merits, before the court and jury, and petitioners presented their plea of immunity to the jury, and all the evidence thereon as above set out, and petitioners then requested the court to instruct the jury to return a verdict of 'not guilty' against each of them, which request was made by motion and by special requested charge. Which motion the court denied and refused to give the special requested charges, to which petitioners excepted. (Tr. 130; 138).

Petitioners then requested the court to submit to the jury, in appropriate language, and in terms of law, the issue of immunity as raised by their plea in bar, and permit the jury to pass upon this plea separate and apart from the issue of 'guilty' or 'not guilty', which motion the trial court refused, to which petitioners excepted. (Tr. 130-131; 138-9).

Petitioners then prepared in writing, and presented special charges to the court, which they requested the court to give, which charges are copied fully in the petition—under this cover—and it is not deemed necessary

to set the same out in full here. Which charges the court refused to give, to which petitioners excepted, and preserved their exception by assignment of error. (Tr. 131-133; 138-142).

The trial court then instructed the jury on the merits of the case, and on the issue of immunity, as follows:

"Now, there has also been introduced in this case, gentlemen, a special plea of the defendants Sherwin and Schwarz, claiming immunity from prosecution because of certain transactions had before the Federal Trade Commission, the nature of which are set forth in detail in the evidence stipulated in the case, and which need not be detailed at this moment. With respect to the plea as indicated by the court the other day in the judgment of the court, there being no question of facts involved, and counsel being of the opinion that there is no question of facts involved, there is no conflicting evidence, it being purely a question of law presented, the court therefore will instruct you, and does instruct you to return a verdict in favor of the Government and against the defendants with respect to the plea of immunity, and I have prepared for your use, a special verdict on the question of the plea of immunity, and have indicated that it is to be returned by you for the Government and against the defendants by direction of the court, and I will ask your foreman before returning into court to sign that verdict." (Tr. 134).

To which action of the Court petitioners, excepted and properly preserved the same. (Tr. 137-138.)

The jury returned a verdict as instructed by the court on the issue of immunity, and further found petitioners guilty on each and every count of the indictment, which verdict was accepted by the court. (Tr. 58-61.)

The court sentenced petitioners, as set forth fully in

the petition under this cover, and it is not deemed necessary to copy the judgment here. (Tr. 60.)

Petitioners presented their writ of error to the Circuit Court of Appeals for the Fifth Circuit, and the judgment of the trial court was affirmed. (Tr. 167-175.)

Motion for rehearing was presented and denied. Tr. 192.)

SPECIFICATIONS OF ERROR.

1.

The trial court erred in overruling, and in not sustaining petitioners' plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, and in failing to instruct the jury to return a verdict of not guilty, as requested by a motion and in a special charge; (Assignment of Error No. 2 and 4; Tr. 137-138) and the Circuit Court of Appeals erred in affirming said action of the trial court, because it was not denied by the government, and the record conclusively established that petitioners were summoned (or subpoenaed) by the Federal Trade Commission to, and they did, answer a lawful inquiry of the Federal Trade Commission, and there was demand of them by the Federal Trade Commission, and they were compelled by the Federal Trade Commission, under threat, to produce documentary evidence, and they did produce the same, in obedience to the summon (or subpoena) or lawful requirement of the Commission, and the evidence given, information furnished and documents produced were concerning the matters and things about which they were later indicted in this case. Immunity flowed to these petitioners by virtue of the statute, and they should not have been prosecuted or subject to any penalty

or forfeiture for, or on account of, any transaction, matter or thing about which they testified or produced evidence.

The statute gives the Federal Trade Commission power and authority to demand and compel the production, by subpoena, or by lawful requirement, or by lawful inquiry, evidence, documentary or otherwise, and a person is not excused from giving or furnishing this evidence for the reason that it might tend to incriminate him. If the Federal Trade Commission, by subpoena, or without subpoena but by lawful requirement, demands and receives such evidence, the person so called upon, who furnishes the same, is immune from prosecution for, or on account of any of the transactions, matters or things about which he testifies or produces such evidence. The demand for and compelling the production of, and the receiving of the evidence, documentary or otherwise, or the mere acquisition of evidence, documentary or otherwise, by the Federal Trade Commission, through subpoena or lawful requirement of the commission, within itself gives immunity to the person for or on account of any of the matters and things about which he may testify or furnish evidence.

2.

The trial court erred in peremptorily instructing the jury to return a verdict against petitioners on the issue of their plea of immunity (Assignment No. 3; Tr. 137) and in charging the jury in substance that the plea of immunity was a question of law, and that he, the court, would instruct the jury to return a verdict for the government and against petitioners on that issue. (Tr. 134). And the Circuit Court of Appeals erred in affirming the action of the trial court, because the record discloses, without

contradiction, that the Federal Trade Commission, through Mr. Southworth, demanded of petitioners, and compelled them, through fear of penalties of the law, to answer a questionnaire, and furnish evidence, documentary and otherwise, to the Federal Trade Commission, and said evidence furnished, and the answers so made, were about and concerning the matters for which they were later indicted, and were then about to be tried. The statute grants immunity from the penalties or forfeitures for, or on account of the transaction, matters or things concerning which they testify or produce evidence to the Federal Trade Commission in response to a subpoena or lawful inquiry, or in obedience to a lawful inquiry, or in obedience to a lawful requirement and the court should not have peremptorily instructed the jury to return a verdict in favor of the government and against petitioners on their plea of immunity.

3.

The trial court erred in refusing to instruct the jury in appropriate language, and in terms of the law, as to the rights of petitioners with respect to the issue of immunity as raised by their plea of immunity, and the evidence concerning same, as was set out in the special charges heretofore copied in this petition, (Assignment of Error No. 5; Tr. 138-142) because the statute gave petitioners immunity from penalties and forfeiture for, or on account of any transactions, matters and things concerning which they might testify or produce evidence documentary or otherwise before the Federal Trade Commission. The petitioners made their plea and claim of immunity in writing before the court, and later before the court and jury; they introduced evidence thereon, and same presented a question of fact and

the court should have given petitioners' requested charges as the same properly presented the law applicable to the issues.

4.

The Circuit Court of Appeals erred in its opinion, wherein it said, "The evidence furnished in compliance with a request or demand by an examiner of the commission, without the issuance of a subpoena, is not ,within the terms of the provision of the statute," because this is in our opinion an incorrect interpretation or application of the law. Immunity is given persons who appear before the Federal Trade Commission and testify under oath, or furnish evidence, documentary or otherwise, or who furnish evidence without regard to subpoena or oath to the Federal Trade Commission in answer to any lawful inquiry of the Federal Trade Commission, or who furnish evidence, documentary or otherwise, with regard to subpoena or oath, to the Federal Trade Commission, in obedience to a lawful requirement of the commission. The Circuit Court of Appeals says that the test as to whether immunity flows or not is—did the subpoena issue? Did the witness appear in obedience to the subpoena and testify under oath. The statute says a person can be punished who fails or refuses to attend and testify, or answer a lawful inquiry, or produce documentary evidence (1) in obedience to a subpoena, (2) in obedience to any lawful requirement of the commission. If a person answers any lawful inquiry without a subpoena, or testifies, or produces documentary evidence, either, in obedience to a subpoena or in obedience to a lawful requirement of the commission, he should be equally immune from penalties or forfeiture for or on account of any trans-

actions, matters or things concerning which he may testify or produce evidence. (Page ——)

BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR CERTIORARI.

Article 8836, as enacted in 1914 and 1916, having to do with the Federal Trade Commission and those coming under its jurisdiction, not only creates the commission but defines its functions and authority, among which it is empowered to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of any corporation, joint stock association or partnership other than banks and common carriers, and their relations to other corporations, associations and partnerships. (Art. 8836-f.) This article further empowers the commission OR ITS DULY AUTHORIZED AGENTS, to require the attendance and testimony of witnesses and the production of documentary evidence by said witness, relating to any matter under investigation, (Art. 8836-I) and it is made an offense on the part of the individuals having such information to "neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena, or LAWFUL REQUIREMENT OF THE COMMISSION," and a failure to so comply with such lawful requirement (Art. 8836-j) carries with it the imposition of a penalty of not less than \$1,000.00 nor more than \$5,000.00 or by imprisonment for not more than one year or by both such fine and imprisonment.

Unless immunity be granted to the person so testifying and furnishing documentary evidence, and meeting the other LAWFUL REQUIREMENTS OF SAID COMMISSION it would be in direct violation of the Fifth Amendment to the Constitution of the United States, and to

meet this provision of the Constitution, Art. 8836-i provides, "no person shall be excused from attending and testifying, or from PRODUCING DOCUMENTARY EVIDENCE BEFORE THE COMMISSION or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him might tend to criminate him or subject him to be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise, before the Commission in obedience to a subpoena issued by it."

Thus we find a statute whereby the Federal Trade Commission in the furtherance of an investigation may require any individual to give testimony and furnish documentary evidence concerning a matter under investigation by said Commission, and when such testimony is given, the individuals giving the same are immune from prosecutions about any transactions, matter or thing concerning which he had previously testified or furnished documentary evidence.

Sherwin and Schwarz were engaged in the oil business, the drilling of wells and selling of stock; they had organized three companies, to-wit, General Lee Interests No. One, General Lee Interests No. Two, and General Lee Development Interests as evidenced by their three respective declarations of trust (Record pp. 69, 80 and 88), and Sherwin and Schwarz were officers of each of these joint stock associations, were drilling oil wells, purchasing mineral leases and selling stock in each of the said companies. These petitioners had employed Robert A. Lee in whose name the companies were organized and operated (Record pp. 104 and 105), and these petitioners were to pay Robert A. Lee the sum of \$50.00 per month, and ten per cent of the profits of said company (Record p. 102).

These petitioners had secured drilling contracts and had a list of all of the purchasers of stock in either or all of their companies, and all of these matters or at least a greater portion thereof, were known only to these petitioners, and the documentary evidence was possessed only by them.

The Federal Trade Commission was making an investigation of various oil companies, and acting through Otis B. Johnson, its Secretary, the Federal Trade Commission mailed to petitioners, which was by them duly received, a letter demanding all of the information and facts possessed by these petitioners concerning the operation of these three companies (Record p. 64) which letter is as follows:

“Washington, July 30, 1922, General Lee Development Interests, Edwards Building, Fort Worth, Texas, Sirs: This Commission officially requests that under sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which you cannot answer immediately, please supplement your first statement with seven days upon receipt of this letter. The Commission will consider application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of Schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry.

“This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of

filling this information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

Petitioners refused to give the testimony and information requested in said letter. Later on, John F. Southworth, agent of the Federal Trade Commission, called at the office of the General Lee Company, which was in charge of these petitioners (Record p. 65) and demanded that petitioners furnish such information. Petitioners replied that they did not have to furnish him with the information. Thereafter these petitioners complied with said demand and furnished the information, gave the testimony, answered the questions and furnished documentary evidence, as shown by the testimony of petitioner, Sherwin, beginning (Record p. 65)

"Southworth then said, we did come under the jurisdiction of the Federal Trade Commission and that by not answering the questionnaire sent to us, we were committing a crime subject to a penalty of imprisonment and fine, either or both. I told him I had consulted my attorney, Mr. Turner, at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we did not have to fill out or file any questionnaire sent to me, by the Federal Trade Commission. Mr. Southworth then asked me for the address of my attorney and I gave it to him. He again told me we were committing a crime, and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. Southworth had an appointment with Mr. Turner and they met in our office, and read the law to Mr. Turner, Mr. Schwarz and myself, after which Mr. Turner then advised me that in accordance with that law we were com-

mitting a crime by not answering the questions. We then gave him (Southworth) everything that he demanded, the declarations of trust, copies of contracts, copies of leases, showed the record of our books, gave him a list of the stockholders and some correspondence we had on some of them. We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him; in fact, we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, the leases were partly typewritten and partly on forms filled in. He got the names of our stockholders from our stock ledger. The stock ledger was furnished him by Mr. Schwarz. We were both present all of the time, and acted together in furnishing Southworth this information.

"This gentleman (Mr. Southworth) came to our office a half dozen times before we gave him any information. After we began furnishing him with documentary evidence and information, he came to our office about twenty times. When he left our office and this city, he left with these documents in his possession. After Southworth left the city we received communications from him by telegram. The four documents you now hand me are the two telegrams received from Southworth by us, and of my two replies thereto, and they are marked Exhibits 4, 5, 6 and 7 (the exhibits were offered and admitted in evidence) and are as follows:

"No. 4. October 27, Eldorado, Arkansas, Charles Sherwin, care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, Eldorado, not received. Southworth."

"No. 5. Fort Worth, Texas, October 27, 1922. John

F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz."

"No. 6. November 8th, Kansas City, Missouri, General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth."

"No. 7. November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin."

These petitioners further testified in substance (Record p. 68) that they refused to give Mr. Southworth any of the information, testimony or documents that he was seeking for the Federal Trade Commission, and as agent thereof, until they were convinced that it was their duty, by virtue of Art. 8836 and the subdivisions thereof, to furnish the same; that Southworth presented and read this law to them, and in effect threatened them with prosecution unless they did surrender this evidence and these documents. Further testifying, these petitioners said (Record p. 69): "I never did make at any time, or intend to make any statement that I had waived any rights which the laws of the land gave me," and further testifying, petitioners said (Record p. 105):

"No one had a list of our stockholders, save and except us (Sherwin, Schwarz and Lee), and our companies, and no one had a copy of the contract between Mr. Schwarz and myself on the one hand and Mr. Lee on the other; that document was not recorded. He, Southworth, inquired into the date of incorporation and we answered every question and he put down the answers to each and every question on the questionnaire. I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. . . . He (Southworth) reported himself

to be an agent of the Federal Trade Commission. . . . When he called upon us and made himself and his official position known, he wanted to know why we had not answered the questionnaire sent us from Washington" (Record p. 65.)

Further testifying with respect to the character of the testimony, information and documents furnished the petitioners said (Record p. 107)

"In addition to this, I gave Southworth the address of the largest stockholders we had at that time. We let him make notes from correspondenec which he wanted to read, and this correspondence related to the purchase of interests of some of our stockholders who had already purchased stock. In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed Southworth other letters in which complaints were made that had not been adjusted. He specifically called for those letters. . . . He did not mention the name of the stockholders who had specifically complained, but he wanted letters containing complaints, if any, we had at that time."

The questionnaire contained some fifty questions with subdivisions thereunder, which sought every character of imaginable information respecting the organization and operation of the three companies in which these petitioners were interested, were fully answered by these petitioners to Southworth, and it gave to the Federal Trade Commission, through Southworth as their agent, every conceivable bit of knowwledge which these petitioners possessed without an exception, including the taking of the said John Southworth out to the field upon the lease where the well was being drilled, and there explaining to him in detail the physical property

and their mode of operation. The questions and answers to the questionnaire fully disclosed all the methods employed by these petitioners, both private and public. (Record pp. 108 to 117 inclusive).

It was established beyond any peradventure of a doubt, and was uncontradicted that John F. Southworth was and is the authorized agent of the Federal Trade Commission, such as is mentioned in Article 8836, not only by the documents and the testimony of the defendant's, but by the government's witness J. S. Swinson, who testified that he was a postoffice inspector, and that

"I know John F. Southworth (Record p. 126) I met him last fall * * * As near as I can get at it, his business is to procure information for the Federal Trade Commission of the United States Government. I think his title is Special Examiner Federal Trade Commission."

Article 8836 provides, "Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense, etc." It will thus be observed that these petitioners at first refused to give this testimony, notwithstanding the letter from Johnson, the Acting Secretary of the Federal Trade Commission, and notwithstanding the five or six visits of Southworth to their office, and his appeals to them personally demanding said information, and only gave said testimony upon being convinced that under Article 8836 they were not permitted to refuse to give same FOR ANY REASON and after this law was read to them, and explained, both by Southworth and attorney for these petitioners to have that effect.

It is true no subpoena was issued, but inasmuch as

the witness was present before Southworth, it was unnecessary that a subpoena should issue. This question is fairly discussed and that principle clearly announced in the case of the United States vs. Armour & Company, 142 Fed. 808, in which case the court was discussing a similar question arising under a similar statute, granting immunity, known as the Interstate Commerce Act, which was enacted February 11, 1893, in which the court said:

"But it is insisted by the government that they had not given under compulsion because they did not give under what is known in law as a testimonial compulsion, and it is argued that testimonial compulsion means compulsion furnished by the subpoena and oath. * * * The subpoena is not necessary where the person is present in Court or within the verge of the court. The only object of the subpoena is to secure the attendance. It is superfluous when he is present, without subpoena. (United States vs. Sanborn, 28 Fed. 299 at p. 302)
* * * I am clearly of opinion that the best judgment to be had from all of the authorities is that the subpoena is a useless and superfluous thing after the tribunal and witness are together. And I am also of opinion that under these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they are adduced as showing admission against interest and against the party producing them."

And while no oath was administered, yet from the sound reasoning set forth in the Armour case, *supra*, that neither a subpoena to require attendance nor oath for the giving of testimony was used, that neither was necessary, and that said proceedings and the testimony given at such hearing amounted to the same as a matter

of law as if the subpoena had actually been issued and the oath administered. In any legal proceeding a defendant may waive the issuance of a subpoena and present himself in court and obtain the same protection as if actually subpoenaed and likewise the government may waive the administering of the oath to a witness in either of which events the result of their having come in contact with each other for designated purposes would be the same.

It is apparent from the reading of Article 8836j that the subpoena and oath each might be dispensed with, for that an individual is penalized not only for refusing to attend and testify, but "OR TO ANSWER ANY LAWFUL INQUIRY OR TO PRODUCE DOCUMENTARY EVIDENCE," and while this is subsequently said to be in obedience to a subpoena, it also says, "OR LAWFUL REQUIREMENT OF THE COMMISSION," and certainly without dispute it must be said that Southworth had required these defendants "to answer any lawful inquiry" in obedience to a "lawful requirement of the Commission." And if he choose to waive the swearing of the witness on behalf of the government, the government ought not to be permitted to take advantage of it at any time thereafter.

The hearings by the Federal Trade Commission had before its agent, John F. Southworth, in which these petitioners furnished the testimony and documents aforesaid, was had beginning June 30th, 1922 (Record pp. 64, 67), and before the convention of the grand jury at which this indictment was returned, and before the convention of the grand jury which was March 12, 1923 (Record p. 1), and necessarily before the date of this trial.

The indictment and the several counts therein contained discloses that the alleged offenses set forth

therein were based upon the transactions, matters and things concerning which the petitioners had previously testified and produced evidence, documentary and otherwise, before the Federal Trade Commission, and upon these charges these petitioners were subsequently convicted (Record p. 58); in fact, some of the identical documents and contracts, or at least copies thereof, which petitioners testified they furnished to the Federal Trade Commission, and in which in some instances no one except these defendants had knowledge or copies until the same was furnished to John F. Southworth, was introduced as evidence against these petitioners upon the trial of this cause, on its merits, and was a part of the evidence used in securing their conviction. About this, the government can make no contention, because it is an agreement contained in the record respecting the same, which is as follows (Record pp. 128 and 129):

“That the government’s exhibits one, two and three, the same being the declaration of trust of the General Lee Interests No. One, General Lee Interests No. Two and the General Lee Development Interests, respectively (which are copied herein), were introduced by the government in the trial of this case on its merits; that identical copies of each of these documents are the same ones which the defendants Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission, and that each of these documents were recorded in the deed records of Tarrant County, at the time the copies thereof were furnished. That the government exhibit No. , the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson, as second parties, of date April 12th, 1922, and the same containing a copy of the agreement by and be-

tween R. A. Lee and Sherwin and Schwarz, concerning the compensation of the said Robert A. Lee for his services in said company (a copy of which contract is contained herein) is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and that this last mentioned exhibit was introduced by the government in the trial of this case on its merits."

This alone, we think, is sufficient to show that the inquiry of the government as to the acts of the petitioners upon the trial of this case involved the same identical questions as were involved and inquired into and about by the Federal Trade Commission agent, John F. Southworth, when these petitioners were before him as a tribunal many months before any criminal investigation, such as finally culminated in the conviction of these petitioners, was given; but this is not all, in fact, is but a small part of the transactions, matters and things inquired about by the court in the trial upon the merits, but this can only be reflected by this tribunal, in the absence of a full statement of facts, by a reference to the allegations in the various counts of the indictment herein, the proof of which was necessary to a conviction.

It will be noted the first count of the indictment, in which the conspiracy, scheme and intent to defraud and artifice to obtain money and property by false pretenses, etc., refers exclusively to these petitioners' organization and promotion and sale of shares of stock in three oil companies named therein, to-wit: General Lee Interests No. One, General Lee Interests No. Two, and the General Lee Development Interests (Record p. 4), in the form of trust estate for the pretended purpose of engaging in the production and sale of oil and leases for profit, all of which information as to the methods, man-

agement and operation thereof was secured from these defendants by the Federal Trade Commission.

It is further shown in said indictment and in count one (Record p. 5), that it was a part of the scheme to advertise Robert A. Lee as the complete manager and director of these companies; that in truth and in fact said companies were not under his management and direction, but were dominated and controlled by these petitioners, and that in truth and in fact, as the petitioners then and there well knew, the said Robert A. Lee had not been known to the said financial world, but "IN FACT LOANED HIS NAME TO SAID SCHEME FOR \$12.50 PER WEEK." From this averment it can be readily seen the important part played by the securing of the contract between Sherwin and Schwarz on the one hand and Lee on the other, in sustaining this allegation of artifice and scheme to defraud; for that these petitioners testified and it was not disputed that no one other than these petitioners had any knowledge of or possessed a copy of this contract which disclosed his employment at \$12.50 per week until Southworth secured same for the Federal Trade Commission.

It is not intended to be said here, in the absence of a record to support us, that proof of all of the allegations contained in said indictment was furnished by Sherwin and Schwarz to the Federal Trade Commission, and afterwards by that branch of the government transmitted to some other branch that was seeking to prosecute these defendants therein, but we do respectfully assert that all of this information upon which this indictment and the various counts thereof are based, was furnished to the Federal Trade Commission long before an investigation by the grand jury which returned the indictment and long before the convention of that body.

Some of the documents (not all, however) which peti-

tioners furnished to the Federal Trade Commission, were recorded in the public records, and, we may presume, might have been obtained by the Federal Trade Commission through that agency. That is not the question for determination here. It is not a question how they could have gotten the testimony and the documents, but a question of how they actually did get them from these petitioners.

In view of the Federal Trade Commission Act and the powers and duties of its agents thereunder, and the benefits and burdens affecting individuals called upon to give testimony, and in view of the testimony, documentary and otherwise, furnished by these petitioners, can it be said that this government should be permitted to penalize them in a criminal action in which the same questions are involved?

It is the contention of the government, and as was concluded by the trial court (Record p. 162), "there was no suggestion at any time by anybody of a possible claim of, or reliance upon, expected immunity." The government, in substance, contended there was no demand by the petitioners for immunity on the part of these petitioners in the giving of this testimony before the Federal Trade Commission, and no notice given the government by the petitioners as to their intentions so to claim immunity, and they were, therefore, not entitled to it. This, we think, is fairly answered in the opinion of the court in the case of *United States vs. Armour & Company*, 142 Fed. 808, this excerpt from page 821:

"The fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress, by the immunity laws in question, and

by each of them, has taken away the privilege contained in the amendment, and it is conceded in argument that this cannot be done without giving to the citizen, by way of immunity, something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act, Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held, in the case of *Counselman vs. Hitchcock*, 142 U. S. 547, that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower.

"Now, in my judgment, the immunity law is broader than the privilege given by the Fifth Amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act (immunity) wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act (immunity) gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. **The immunity flows to the witness by action of law, and without any claim on his part.**"

The principles relative to this immunity "flowing to the witness as a matter of law, are thoroughly discussed in an opinion by the Supreme Court, delivered by Mr. Justice Brown in the case of *Hale vs. Henkel*, 26 Sup. Ct. p. —; 50 Law Ed. 652, in which the court said:

"The extent of this immunity was fully considered by

this court in Counselman vs. Hitchcock, *supra*, in which the immunity offered by revised statutes, Section 860, was declared to be insufficient. In consequence of this decision, an Act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This Act was declared by this court, in Brown vs. Walker, 16 Sup. Ct. 644, 40 Law Ed. 819, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional rights to refuse to answer. Instead, the act was passed apparently to meet the declaration of Counselman vs. Hitchcock, *supra*, that 'a statutory enactment, to be void, must afford absolute immunity against further prosecution for the offense to which the question relates.' If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith."

Thus, it is observed, that by virtue of the immunity clause in Art. 8835j, an individual giving testimony cannot claim his privilege on account of the same being incriminating as against him, and that the immunity from prosecution thereafter flows as a matter of law. This principle is approved by the Supreme Court in *Nelson vs. U. S.*, in which an immunity statute and the right of a witness thereunder was being discussed, and the *Hale vs. Henkel* case, *supra*, was cited with approval. 26 Sup. Ct. 358; 50 Law Ed. 673.

In *Brown vs. Walker*, opinion by Mr. Justice Brown. 16 Sup. Ct. 644; 40 Law Ed. 819, in which the court was discussing immunity from prosecution on account

of evidence given before the Interstate Commerce Commission, the court said:

"The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon, either in England or in this country, although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction; although, as was said by this court in *Ex Parte Garland*, 71 U. S. 333, it extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. . . . Amnesty is defined by the lexicographers to be an act of the Sovereign power granting oblivion, or a general pardon for a past offense . . . and is usually exercised in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted."

And the court, further commenting on this question, used the following language:

"Thus, in *State vs. Nowell*, 58 N. H. 314, a statute which provided that a clerk, servant or agent should not be excused from testifying against his principal, but that he should not thereafter be prosecuted for any offense disclosed by him, was held to have deprived him of his privilege of silence. In delivering the opinion the court observed that 'the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which

he is compelled to disclose; otherwise the statute would be ineffectual! He is to be secured against all liability and future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution, criminally, for any matter in respect to which he may be required to testify. The additional exception becomes absolute when the witness testifies, and he being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself * * * the legal protection of the witness against prosecution for crime disclosed by him is, in law, an equivalent to his legal innocence of the crime disclosed."

In the case of *Heike vs. U. S.* 30 Sup. Ct. 539; 54 Law Ed. 821, in which the court decided that an appeal from an interlocutory order overruling a plea of immunity did not lie until a conviction of the defendant was had, after which time it might be brought up for review, and in discussing the question of immunity said: "We think then that the effect of the immunity statute in question is not to change the system of appellate procedure in the Federal courts, and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which, if denied, may be brought up for review after the final judgment in the case."

The defendants filed their plea of immunity as set out in page ___ of this brief (Record p. 47), and the testimony in support thereof (Record pp 63 to 192) was heard by the court and jury, the facts being undisputed, should have been sustained by the court.

It is undisputed from the record in this cause that a duly authorized and commissioned officer of the Federal Trade Commission subpoenaed the General Lee Development Interests, of which these petitioners were officers,

to furnish him such official information pertaining to their business. A subpoena legally means a process, to cause a witness to appear and give testimony under a penalty. Necessarily a subpoena means more than the process of the court, because in this instance the Act creating the Federal Trade Commission, authorizes it to subpoena witnesses and compel them to give testimony and furnish information under a penalty. There is no set form for this kind of subpoena. If it is duly issued by the Federal Trade Commission, or its officers, and demands information pertaining to such matters as the Federal Trade Commission may desire to seek information, it is within the contemplation of this act a subpoena. Then, the petitioners were duly and legally subpoenaed in this case. This subpoena petitioners disobeyed.

The act creating the Federal Trade Commission empowered such commission to have and hold hearings, and to compel witnesses to come before it, and empowered it to compel these witnesses to testify and furnish information and produce documentary evidence. Congress had in mind that the Federal Trade Commission would sit at some place convenient for it, and Congress desired to furnish this Commission means by which it could compel witnesses to come before it at its convenience. In the instant case, the duly authorized officer of such Commission, and so acting, was the Commission, saw fit, either for his convenience or to expedite matters, and to force obedience to his subpoena, to take himself, the Commission, to the office of the General Lee Interests, instead of compelling the General Lee Interests and its officers to come to him, and having so taken the Federal Trade Commission to the offices of the General Lee Interests in Fort Worth, he demanded to know why its officers had not complied with his subpoena and furnished the information requested and demanded. (Tr. 64).

There the Federal Trade Commission demanded of the officers of the General Lee Interests why they had not complied with his (the Commission's) subpoena to furnish information requested and demanded, to which the General Lee Interests, speaking through these petitioners, stated that they were not under the supervision of the Federal Trade Commission, and for that reason were not compelled to obey this subpoena and furnish the information requested and demanded. (Tr. 65.) Whereupon, the Federal Trade Commission, dealing fairly with a citizen, advised petitioners that they were under the supervision of the Federal Trade Commission, and were compelled to furnish information and to obey the subpoena which had been directed to and served upon them. (Tr. 66). Petitioners were not convinced of the authority and power of the Federal Trade Commission, and the Federal Trade Commission, further dealing fairly with a citizen, undertook to point out, read and explain its powers and authority and to convince petitioners that they were in error, and must obey the process, requests and demands of the Federal Trade Commission. (Tr. 66). Petitioners still not convinced, told the Federal Trade Commission that their attorneys had advised them that they were not under the control of the Federal Trade Commission, and the Federal Trade Commission, still dealing fairly with a citizen, requested the address of the attorney, and to convince the attorney and petitioners that petitioners were compelled to obey the subpoena of the Commission and furnish the testimony and information requested and demanded, and to that end, met again in their office, when their attorney was present, and again read to petitioners and their attorney the law under which the Federal Trade Commission was then asserting his authority, and explained his power, which permitted him, and authorized him and empowered him to request and demand testimony and information from

petitioners, and to that end explained to the attorney and petitioners that by petitioners' refusing to furnish the information they were committing a crime, and read to the attorney and petitioners in the same connection with his power to demand the information, his power also to penalize petitioners if they refused to comply with his demand and request. Having convinced the attorney of petitioners, the attorney advised petitioners that they were under the supervision of the Federal Trade Commission, and that they were compelled to comply with the demand or request from the Federal Trade Commission, and furnish information, documentary or otherwise, and testify before the Trade Commission, and if they refused that they were guilty of a crime, and could, by the Federal Trade Commission, be punished. (Tr. 65-66; Tr. 122).

We believe our statement that the letter of the Federal Trade Commission directed to the General Lee Interests, and which they received, (Tr. 64) was a subpoena; and further in this connection, we call this court's attention to the reading of the statute, Section 7937 (Compiled Statute Section 8836-J) in part as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty," etc.

If we are not correct in this being technically a subpoena, we can at least say that the Federal Trade Commission adopted this method of demanding the information, to the end that they might receive it for its same value and worth as if it had been secured by a subpoena; and this requirement in the letter was the choice of the Trade Commission, and it was its method of seeking to enforce its power; and when he called upon petitioners

he had not further armed himself with any process or subpoena, demands of petitioners, not that they comply with a subpoena that he then had, or that they comply with any other process other than the letter which he had directed to them, he asked petitioners why they had not complied with that process, letter, subpoena or lawful request, and furnished the information demanded. (Tr. 65.) This letter was at least a lawful inquiry under the Federal Trade Commission Act, and it called for information to be furnished the Federal Trade Commission in obedience to lawful requirement, and the Federal Trade Commission, speaking through Mr. Southworth, said to petitioners: "If you neglect or refuse to answer this lawful inquiry or produce the documentary evidence in obedience to the lawful requirement of the commission, you have committed a crime and subject to punishment for not less than one thousand nor more than five thousand dollars, or imprisonment for not more than one years, or both." (Tr. 65-66.)

The Circuit Court of Appeals, in affirming this case, says that the plea of immunity is not good, because no subpoena was issued and neither of the defendants were sworn, and none of the statements made by defendants in pursuance of the request or demand of Southworth was under oath. Thereby saying that Southworth was not acting as the Federal Trade Commission, and was not acting within his power and authority when he called upon petitioners and demanded and received the information from, and documentary evidence of these petitioners. The Circuit Court of Appeals by this statement says, that the Federal Trade Commission has no authority to demand or receive information except that it subpoena a witness, and cause the witness in obedience to subpoena, to come before it and testify or produce these documents, and that it cannot receive such information then except that it swear the witness. If the Circuit

Court of Appeals is correct in this, then Southworth, or the Federal Trade Commission, was wrong when it and he stood before petitioners and said that they were compelled to give this testimony under penalty of being punished as criminals.

The Federal Trade Commission, through Mr. Southworth, informed of its authority and powers as it is, well knew that if it pursued the power and authority to demand of any person that he testify before it, and that he furnish it information, that such act by it furnished immunity to the person interrogated and from whom the information was obtained. The same law that gave it the authority to demand the information and receive it, advised it that when it did so, immunity flowed to the man it was seeking the information from by virtue of its own demand, and because of its act it granted immunity to the citizen about the matters it asked him about or got information from him on. **The government would be unfair to its citizens to arm its agents, and permit them to go to this citizen clothed with such authority, and demand information under the penalty of putting him in jail if he refused to give it, then say to him that if he complied with their demand he did not have the benefit of the same law under which they were claiming their authority.**

Mr. Southworth—and thereby the Federal Trade Commission—thought that he and it had the right to go to petitioners and demand this information; he convinced petitioners that he had such a right. Then, in order to deal fairly with the citizen, the government should say to him, "Did you believe that you were compelled to give this information requested and demanded of you by the Federal Trade Commission; if you thought you were compelled to give it, and if you gave it involuntarily to the Federal Trade Commission upon its demand, order, subpoena or other lawful requirement as

the statute prescribes, then you have for your safeguard the statute which was enacted for your benefit; as we take from you the benefit and safeguard of the Fifth Amendment, and we armed ourselves with the law which took from you that safeguard, and demanded and compelled you to give us testimony in violation of that amendment; at the same time, the law which gave us that authority, gave you the right to say that you should not be prosecuted for anything concerning which you had testified and furnished information.

We desire to call the court's attention to what we believe is fair dealing between the government and its citizen:

"This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—the obligation of keeping faith with the individual. Whenever the time comes when the courts, in their eagerness to apprehend criminals, deny to the accused that which the laws and the Constitution give him; when men are convicted of offenses against their government, and in the process of that conviction every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more." (U. S. vs. Pardue, 294 Fed. 543.)

While the facts of the two cases are not exactly sim-

ilar, the discussion by the court comprehends the situation such as we have in this case, and we desire again to quote from the above decision:

"In what has been said it is not meant to hold that the mere fact of a subpoena confers an exemption. The controlling question is: Did he testify voluntarily, or upon compulsion; and it is in my opinion immaterial in law whether the witness testified under a subpoena or was called without a subpoena and put upon the witness stand upon compulsion by the government. Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion, if a witness appears under a subpoena and is placed upon the stand by the government, the fact of compulsion is *prima facie* established, and the burden shifts to the government to show, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege and testified voluntarily." (U. S. vs. Pardue, *Supra*.)

In the instant case the petitioners have undertaken the burden of showing, both that they were not subpoenaed and that they were compelled to testify—at least they were convinced by the Federal Trade Commission that they were compelled to testify, and beyond contradiction this record establishes that they did not testify voluntarily:

The Circuit Court of Appeals in its opinion, adopts, in our judgment, a most unreasonable, unfair and narrow construction of this statute. It says:

"The language of the amnesty or immunity provision, especially when that language is considered in the light of its context, manifests the absence of any intention to grant amnesty or immunity to a

person who furnishes evidence without a subpoena to him having been issued by the Commission."

To establish the narrownes of this, we fell it only necessary to quote to this court the statute:

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty."

We ask your patience in this. Congress had in mind that information might be had in other ways than by a subpoena, because it says, "No person shall be excused from attending and testifying," and it does not refer to "under subpoena or other process." And it then says, "or from producing documentary evidence before the commission." It does not, in this instance, say, "Or in obedience to a subpoena or other process." And then it says, "or in obedience to a subpoena of the commission."

Congress did not see fit to prescribe a form for a subpoena, or direct the mode and manner in which subpoenas should be issued and served for either the attendance of the witness or the production of documentary evidence or the acquisition of the same by the Federal Trade Commission, but it did provide "For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." This court will see that in this language, Congress said that the officers of the Federal Trade Commission had the right, of course in a lawful manner and mode, to get information, access to documents and take copies thereof. Then, having in mind

that some obstruction might be met, or an effort might be made to conceal this information, provides, just following the above: "and the commission shall have power to require by subpoena the attendance, and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." Thereby showing that the commission had the power and authority to get the information it desired without the issuance of a subpoena, but, if it was necessary, they had the power to compel the witness to give and produce the testimony and documents. Then Congress said: "Any person who shall neglect or refuse to attend or testify (this carries with it the suggestion of answering a subpoena) or to answer any lawful inquiry." If it was intended that a subpoena was necessary to get any information, why should Congress say that a person was guilty of an offense if he failed to answer any lawful inquiry. Further, if a person fails or refuse to testify or produce documentary evidence, "in obedience to the subpoena (of course a subpoena has been issued and served), or to produce documentary evidence in obedience to a lawful requirement of the commission;" then if a subpoena was the only method, why should Congress say that a citizen was guilty of a crime and subject to punishment if he failed to give information or produce documentary evidence in obedience to a lawful requirement?

The Circuit Court of Appeals has said that before a person can be immune he must have been summoned and attended under the compulsion of a subpoena and give testimony under oath. Congress and the law under which this man claims his immunity, did not so limit his rights.

Congress gave the citizen immunity in at least two instances: One, when he obeys a subpoena and testifies or gives documentary evidence; the other, when he answers a lawful inquiry made in obedience to a lawful requirement of the commission. And in this instance the

Federal Trade Commission asserted in its letter or demand, and through its agent Southworth, that it was making a lawful inquiry, and that petitioners must obey this lawful requirement of the commission and give testimony under compulsion, and under penalty for refusing. Yet, the Circuit Court of Appeals in this case, says that the only way a person can become immune is to be summoned, attend under process of the subpoena, and give testimony under oath; thereby saying that the only lawful way by which the Federal Trade Commission could get testimony or documentary evidence, is in response to a subpoena; yet, the Federal Trade Commission itself, through Mr. Southworth, says to petitioners that it had the right to compel them to answer their letter and demand, which they say was an official request, and if petitioners failed to comply with and obey this official request, petitioners were guilty of a crime and might be punished." (Tr. 65.)

The Circuit Court of Appeals in its opinion says: "Evidence furnished in compliance with a request or demand of an examiner of the Commission, without the issuance of a subpoena to the person furnishing such evidence, is not within the terms of the provision." (Tr. 171.)

This is the entire opinion of the Circuit Court of Appeals. These four lines include and comprehend the entire opinion of the court. The rest of the opinion is argument and persuasion, attempting to justify the conclusion reached therein. We can do no better than to again refer the court to the quotation in the case of the United States vs. Pardue, to answer this conclusion; and the United States vs. Armour & Company, 142 Fed. 808, previously referred to and quoted in this brief.

A subpoena serves the purpose only of compelling a witness to come to the tribunal and testify. If this

tribunal sees fit to take itself to the witness and there compel the witness to testify, then a subpoena is useless, and the tribunal has accomplished its purpose without the office of the subpoena; and if the tribunal accomplishes its purpose by a threat or coercion or punishment, the witness has been as much compelled to involuntarily deliver up his testimony and documents as if the tribunal was clothed with all the dignity of a court and its attaches and its processes, and we submit that this record discloses that these petitioners refused to give testimony or produce documents until the tribunal convinced their attorney, and he advised them that they were compelled, under penalty, to testify and deliver documents; and then, and then only, and not until then, did they answer questions or give information.

We have burdened this court at length, but we thought the rights of these petitioners would be protected by the Circuit Court of Appeals; but having been disappointed there, we so deeply feel that these petitioners have been unjustly and unfairly dealt with, that in our eagerness we fear we have trespassed upon your patience.

The Circuit Court of Appeals lightly touches upon the fact that the postoffice inspectors gathered information and presented same to the grand jury, independent of the Federal Trade Commission, and therefore, these petitioners were deprived of the rights given them by the law. This is so idle that we do not argue the same with this court. Congress gave these petitioners immunity when they, under compulsion, gave up their information to the Federal Trade Commission, then they were completely, fully and forever immune from prosecution about any of the things concerning which they testified and furnished information; and when the Federal Government through one agency gets the information, under circumstances which give the petitioners immunity, then another agency

of the same government cannot deprive them of that immunity.

These questions are not new to our courts, and in every instance to which our citations have led us, our appellate courts have held that the question of immunity, based upon and growing out of the Fifth Amendment, is one sacred to the preservation of the rights of our citizenship. To say that Congress meant to take away from a citizen a valid right and give nothing in return is but idle talk. So that, Congress, under Art. 8836, in taking away the right of a citizen to claim his privilege from testifying, gave and intended to give him absolute immunity from the prosecution of any transaction, matter or thing about which he had previously testified under the conditions set forth therein. There is nothing left of our vaunted civilization if an absolute right of a defendant, given him by law, is not recognized when invoked by him. The law has no surer champion than the man who feels that he has had the benefit of all its provisions, even though he is ultimately stricken by it; but when one feels its penalties and its rigors without the privilege of enjoying its safeguards and its fairness, he despairs.

Petitioners request that their petition for certiorari be allowed, and that upon hearing this cause be reversed and dismissed.

Respectfully submitted,



Fort, Worth, Texas.
Attorneys for Petitioners.